Gunderson Rail Services, LLC d/b/a Greenbrier Rail Services *and* Sheet Metal Workers' International Association, Local 359, AFL–CIO. Cases 28–CA–093183, 28–CA–103909, 28–CA–104184, 28–CA–106613, 28–CA–111186, 28–CA–112806, and 28–RC–093179

June 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On June 30, 2014, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The General Counsel has excepted to the judge's failure to find a violation based on the allegation set forth in paragraph 5(o) of the complaint, which asserted that the Respondent, by Plant Manager Eric Valenzuela, violated Section 8(a)(1) by informing employees that engaging in union or protected, concerted activities could result in job loss. During a rehire interview with employee Omar Ramos in March 2013, Valenzuela stated:

> [I]t seems to me like people think that [the layoff] was because of the Union—which was not. The reason for the layoff was that the company was losing money, and probably the Union thing may or may not have any—anything to do. But . . . you know, people talking about it, wasting time, . . . , thinking and talking about it made things worse, . . . because you do that on your own

[1] There are no exceptions to the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by (i) paying the CEO bonus in December 2012, (ii) increasing the maximum hourly employee pay rate in January 2013, (iii) implementing a safety committee in May 2013, or (iv) observing the union handbilling in April 2013.

The Respondent excepted to the judge's findings that Foreman Martin Torres unlawfully interrogated employee Jorge Martinez in October 2012 and that certain of its handbook rules violated Sec. 8(a)(1). However, neither the Respondent's exceptions nor its supporting brief advance any grounds for reversing these findings. In these circumstances, the Board's rules provide that the Respondent's exceptions to these findings "may be disregarded." Board's Rules and Regulations Sec. 102.46(b)(2); see *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging Juan Silva, we find it unnecessary to pass on the judge's additional finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to offer to bargain about its discharge of Silva. In affirming the judge's dismissal of the allegation that the Respondent unlawfully told employees that if they selected the Union they would no longer be able to bring complaints directly to management, we note, without passing on whether it was correctly decided, that *Tri-Cast, Inc*., 274 NLRB 377 (1985), is extant law, which the General Counsel concedes is controlling on this issue.

We agree with the judge that the Respondent violated Sec. 8(a)(1) in May 2013 by implementing a "safety poker" program, through which employees could win significant prizes. We note that the program was implemented only at the Tucson facility, where an election petition had been filed. Also, despite its popularity, the Respondent abruptly discontinued the program after the election, a mere 3 months after its start.

Member McFerran finds it unnecessary to pass on the judge's finding that the Respondent unlawfully failed to rehire employees in March 2013. The Board already is adopting the judge's finding that the Respondent unlawfully laid off those employees in November 2012, and providing appropriate reinstatement and backpay remedies for that violation. Those remedies subsume the ones that would accompany the additional refusal-to-hire violation.

Member McFerran also finds it unnecessary to pass on the judge's finding that the Respondent unlawfully threatened employees by exhorting them in a campaign flyer not to "subject your family" to the risks of collective bargaining. She finds this alleged threat cumulative of other threats found by the judge and adopted by the Board.

Further, Member McFerran would not adopt the judge's finding that the Respondent unlawfully implemented a "safety poker" game in May 2013. In her view, the record establishes that the "safety poker" game was a direct response to four safety incidents the preceding month at the Tucson facility, not the organizing campaign. In fact, at the time, the Region had suspended processing of the Union's representation petition due to pending unfair labor practice charges. Finally, the Respondent discontinued the "safety poker" game in July, following a significant reduction in the number of safety incidents at the facility. All of these circumstances indicate that the "safety poker" game was unrelated to employees' organizing activity.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and to the Board's standard remedial language.

In adopting the judge's tax compensation and Social Security reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), as modified by *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1–2 (2016). We do not rely on the following decisions cited in the judge's decisions: *Latino Express*, 359 NLRB No. 44 (2012); *Crowne Plaza Hotel*, 352 NLRB 382 (2008); and *AC Specialists, Inc.*, 359 NLRB No. 159 (2013). We note that *San Luis Trucking*, 352 NLRB 211 (2008), cited by the judge, was reaffirmed by the Board at 356 NLRB 168 (2010), and enfd. mem. 479 Fed.Appx. 743 (9th Cir. 2012), and that *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 (2013), also cited by the judge, was reaffirmed by the Board at 362 NLRB No. 48 (2015).

> time, then you're okay, but if you do it during work—the company was losing money. They have been losing money for months and months. So they were going to shut down this plant.

We recognize that Valenzuela's statements during the course of the interview were somewhat equivocal in terms of whether the employees' union or concerted, protected activities directly caused the mass layoff, found herein to be unlawful, in November 2012. Nevertheless, we find that Valenzuela's conclusion that employees' organizing activities "made things worse" would send a clear message to Ramos that employees' organizing activity could lead to an adverse employment action, including a layoff.[3] Accordingly, we find that Valenzuela's statements were coercive and violated Section 8(a)(1).[4]

For the reasons given by the judge, and those articulated here, we agree with her finding that the Respondent violated Section 8(a)(5) and (1) of the Act by closing its Tucson facility and relocating the work performed there without bargaining with the Union. As the judge found, the relocation of unit work and closure of the Tucson facility was unaccompanied by a basic change in the nature of the Respondent's business: it repaired and serviced railcars before and after the closure of the Tucson plant. The judge further found that, although the Tucson facility's largest customer, TTX, decided to shift its rail car work to the Respondent's facilities other than Tucson, the Tucson facility retained sufficient non-TTX work to support 17 full-time employees. The judge additionally found that labor costs were a primary factor in the Respondent's assessment of whether various facilities—including Tucson—should be "fixed" or, instead, "closed." Rather than bargain with the Union to address the future of the Tucson plant in light of the relocation of the TTX work, the Respondent's management officials unilaterally decided that there were "no options" other than to close down the facility. Finally, we agree with the judge that the Respondent failed to establish that the continued operation of the Tucson facility was not amenable to resolution through the bargaining process.[5] As explained by the judge, any contention that the Union could have offered nothing through collective bargaining is speculative, as the Respondent could not claim to know what solutions the give-and-take of bargaining might have generated. We note, for example, that the question of whether the facility could continue as a smaller operation, consistent in size with some of the Respondent's other facilities, "would be a fruitful subject of labor-management negotiations." *Dubuque Packing Co.*, 303 NLRB 386, 390 (1991) (applying *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), in finding unlawful the respondent's relocation of operations), enfd. 1 F.3d 24, 31 (D.C. Cir. 1993).[6]

We further agree with the judge that the appropriate remedy for the Respondent's failure to bargain includes restoration of operations at the Tucson facility. The Board, with Supreme Court approval, has ordered such a restoration remedy returning to the status quo ante where the change in operation was effectuated in violation of the employer's bargaining obligation. See *Fibreboard Corp. v. NLRB,* 379 U.S. 203, 215–216 (1964). "When bargaining unit work has unilaterally and unlawfully been removed, whether by subcontracting or relocation, it is appropriate to order restoration of the work to the bargaining unit, unless the employer has demonstrated that restoration would be unduly burdensome." *Power, Inc.*, 311 NLRB 599, 600 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994). Accord *Vico Products Co.*, 336 NLRB 583, 587, 599 (2001), enfd. 333 F.3d 198 (D.C. Cir. 2003); *Flamingo Hilton-Reno*, 321 NLRB 409, 409 (1996), enfd. mem. 141 F.3d 1177 (9th Cir. 1998). The Respondent may introduce at compliance any evidence not available before the close of the hearing bearing on the appropriateness of the restoration remedy, including events subsequent to the decision of the United States Court of Appeals for the Ninth Circuit in *Overstreet ex rel. NLRB v. Gunderson Rail Services*, 587 Fed.Appx. 379 (9th Cir. 2014), reversing and vacating 5 F.Supp.3d 1073 (D. Ariz. 2014).

[3] In so finding, we note that there is no evidence that the Respondent ever expressed any concerns with regard to employees discussing other non-work issues during work time.

[4] The Respondent asserts that the Board should not reach this allegation because counsel for the General Counsel "did not argue that the statement constituted an unlawful threat." However, as noted above, Valenzuela's statements were expressly alleged as an independent 8(a)(1) violation in the complaint. Further, the General Counsel produced evidence in support of this allegation at the hearing. Because the Respondent had notice of the allegation and had the opportunity to litigate the issue before the judge, we find that the issue is properly before the Board.

[5] Indeed, the Respondent's effort to retain TTX as a customer at Tucson was based almost entirely on offering reduced labor costs. We fail to see why the Respondent could not apply the same approach to maintaining or expanding its non-TTX customer base at Tucson in the context of collective bargaining.

[6] The judge dismissed the allegation that the Respondent's relocation of unit work and concomitant closure of the Tucson plant violated Sec. 8(a)(3) and (1) of the Act. That dismissal—which was based on a finding that the motive for the closure was economic and not based on antiunion animus—in no way precludes a finding that the closure violated Sec. 8(a)(5). The 8(a)(5) allegation does not turn on motive but on whether the closure was amenable to the collective-bargaining process.

ORDER

The National Labor Relations Board orders that the Respondent, Gunderson Rail Services, LLC d/b/a Greenbrier Rail Services, Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the provision in its employee handbook that contains the following language:

> **Appearance and Attire**
>
> Regardless of the work environment, provocative slogans or images on clothing, hats, etc., and revealing or impractical attire, is not appropriate.

(b) Maintaining the provision in its employee handbook that, in relevant part, contains the following language:

> **External Communications**
>
> GRS has appointed specific representatives to serve as information channels for news media. These representatives are responsible for approval of all press releases, responding to media inquiries, and coordinating interviews with the media—with the exception of marketing or employment related advertising—other employees should refrain from communications with the media.

(c) Maintaining the provision in its employee handbook that contains the following language:

> **Solicitation and Distribution Policy**
>
> Solicitation and the distribution of literature or petitions by any employee or any other individual with the exception of GRS approved service providers is expressly prohibited.

(d) Maintaining the provision in its employee handbook that contains the following language:

> **Confidential Information**
>
> Confidential information. Greenbrier's confidential and proprietary information includes (among other items) . . . personnel information . . . . Confidential information must be used only by authorized persons and only in accordance with Greenbrier policies and procedures.

(e) Coercively interrogating employees about their union membership, activities, and sympathies, and the union membership, activities, and sympathies of other employees.

(f) Promising to erase attendance points and erasing attendance points in order to discourage employees from supporting the Union.

(g) Implementing a safety incentive program in order to discourage employees from supporting the Union.

(h) Soliciting complaints and grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting the Union.

(i) Promising increased benefits and improved terms and conditions of employment for refraining from supporting the Union.

(j) Threatening employees with plant closure if they selected the Union as their collective-bargaining representative.

(k) Threatening employees and denigrating the Union by telling employees that the company is spending money on attorneys' fees to defend against unfair labor practice charges during difficult economic times.

(l) Threatening employees that selecting a union representative would be futile.

(m) Threatening employees with harm if they selected the Union as their collective-bargaining representative.

(n) Threatening employees that engaging in union or protected, concerted activities could result in job loss.

(o) Laying off or firing employees because of their union membership, activities, and sympathies.

(p) Refusing to recall or rehire employees because of their union membership, activities, and sympathies.

(q) Failing and refusing to recognize and bargain with Sheet Metal Workers' International Association, Local 359, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(r) Unilaterally changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain, including: closing the Tucson facility; laying off employees; recalling and rehiring employees, including determining the manner in which the recalls were to be effected; revising the implementation of the annual wage increase; and implementing and rescinding a safety incentive program.

(s) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, rescind the following provision in its employee handbook:

> **Appearance and Attire**
>
> Regardless of the work environment, provocative slogans or images on clothing, hats, etc., and revealing or impractical attire, is not appropriate.

(b) Within 14 days of the Board's Order, rescind the following provision in its employee handbook:

External Communications

GRS has appointed specific representatives to serve as information channels for news media. These representatives are responsible for approval of all press releases, responding to media inquiries, and coordinating interviews with the media—with the exception of marketing or employment related advertising—other employees should refrain from communications with the media.

(c) Within 14 days of the Board's Order, rescind the following provision in its employee handbook:

Solicitation and Distribution Policy

Solicitation and the distribution of literature or petitions by any employee or any other individuals with the exception of GRS approved service providers is expressly prohibited.

(d) Within 14 days of the Board's Order, rescind the following provision in its employee handbook:

Confidential information

Confidential information. Greenbrier's confidential and proprietary information includes (among other items) . . . personnel information . . . . Confidential information must be used only by authorized persons and only in accordance with Greenbrier policies and procedures.

(e) Furnish all current employees with inserts for its employee handbook that (i) advise that the unlawful provisions have been rescinded or (ii) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or, in the alternative, publish and distribute to all current employees a revised copy of its employee handbook that (i) does not contain the unlawful provisions, or (ii) provides lawfully worded provisions.

(f) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time AAR write-up employees, airmen, laborers, material handlers, maintenance mechanics, painters, switchmen, and welder repairmen employed by the Respondent at its facility in Tucson, Arizona, excluding all other employees, including quality assurance inspectors, office clericals, guards, safety coordinators, and supervisors (plant managers, production managers, foremen, quality assurance managers, material managers, plant accounting managers) as defined in the Act.

(g) Upon request, rescind any or all unilateral changes to the terms and conditions of employment of unit employees, including: closing the Tucson facility; laying off employees; recalling and rehiring employees, including determining the manner in which the recalls were to be effected; revising the implementation of the annual wage increase; and implementing and rescinding a safety incentive program.

(h) Restore the status quo ante by reestablishing and resuming operations at the Tucson, Arizona facility as they existed prior to the date of the facility's closure in October 2012.

(i) Within 14 days from the date of this Order, offer:

Alex Amador	Jose Angel Ortega
Jesus Fernando Barnes	Carlos Contreras Ortiz
David Bottinueu	Gabriel Ortiz
Oswaldo Chavira	Brian Perona
Karim Duqmaq	Juan Silva Gutierrez
Hector Federico	Guillermo Gonzalez Pico
Jaime Hernandez	Jesus Omar Ramos
Jesus Armando Lopez-Nuno	Jeff Raske
Jesus Martinez	Jesus Ruiz
Jorge Martinez	Oscar Salinas
Ricardo Martinez	Brian Scaggs
Karl Mason	Jose Manuel Sepulveda
Juan Morales	Rogelio Martinez
Chad Morshback	Frank Soto
Guillermo Murguia	Martin Valdez

full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(j) Make whole the following employees for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision:

Alex Amador	Jose Angel Ortega
Jesus Fernando Barnes	Carlos Contreras Ortiz
David Bottinueu	Gabriel Ortiz
Oswaldo Chavira	Brian Perona
Karim Duqmaq	Juan Silva Gutierrez
Hector Federico	Guillermo Gonzalez Pico
Jaime Hernandez	Jesus Omar Ramos
Jesus Armando Lopez-Nuno	Jeff Raske
Jesus Martinez	Jesus Ruiz
Jorge Martinez	Oscar Salinas
Ricardo Martinez	Brian Scaggs

Karl Mason	Jose Manuel Sepulveda
Juan Morales	Rogelio Martinez
Chad Morshback	Frank Soto
Guillermo Murguia	Martin Valdez

(k) Within 14 days from the date of this Order, offer full reinstatement to unit employees who were transferred, discharged, or quit due to the unlawful closure of the Tucson facility to their former jobs at the Tucson facility, or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed. In the event there are insufficient openings to accommodate all the former Tucson unit employees who wish to return to work at the Tucson facility, including those employees who accepted transfers to the Respondent's other facilities, the Respondent is to bargain in good faith with the Sheet Metal Workers' International Association, Local 359, AFL–CIO about the creation of a preferential recall list and return employees to work at the Tucson facility pursuant to that recall list. Those employees who accepted employment at the Respondent's other facilities are free to remain there and are under no obligation to accept Respondent's offers to return to work in Tucson.

(l) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral closure of the Tucson facility.

(m) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the unlawful layoffs and within 3 days thereafter notify the laid-off and discharged employees in writing that this has been done and that the discharges and layoffs will not be used against them in any way.

(n) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(o) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide, at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(p) Within 14 days after service by the Region, post at its facility in Tucson, Arizona copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2012.

(q) Within 14 days after service by the Region, hold a meeting or meetings during working hours at the Tucson facility, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to employees by a responsible management official of the Respondent or, at the Respondent's option, by a Board agent in the presence of a responsible management official of the Respondent, with translation available for Spanish-speaking employees.

(r) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election held on July 11, 2013, in Case 28–RC–093179, is set aside and that the petition in that matter is dismissed.

Dated, Washington, D.C. June 23, 2016

Mark Gaston Pearce, Chairman

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the following provision in our employee handbook:

Appearance and Attire

Regardless of the work environment, provocative slogans or images on clothing, hats, etc., and revealing or impractical attire, is not appropriate.

WE WILL NOT maintain the following provision in our employee handbook:

External Communications

GRS has appointed specific representatives to serve as information channels for news media. These representatives are responsible for approval of all press releases, responding to media inquiries, and coordinating interviews with the media—with the exception of marketing or employment related advertising—other employees should refrain from communications with the media.

WE WILL NOT maintain the following provision in our employee handbook:

Solicitation and Distribution Policy

Solicitation and the distribution of literature or petitions by any employee or any other individuals with the exception of GRS approved service providers is expressly prohibited.

WE WILL NOT maintain the following provision in our employee handbook:

Confidential Information

Confidential information. Greenbrier's confidential and proprietary information includes (among other items) . . . personnel information . . . . Confidential information must be used only by authorized persons and only in accordance with Greenbrier policies and procedures.

WE WILL NOT coercively interrogate you about your union membership, activities, and sympathies or about the union membership, activities, and sympathies of other employees.

WE WILL NOT promise to erase your attendance points, or erase your attendance points, to discourage you from supporting the Union.

WE WILL NOT implement a safety incentive program in order to discourage you from supporting the Union.

WE WILL NOT solicit complaints and grievances from you and impliedly promise to remedy them in order to discourage you from supporting the Union.

WE WILL NOT promise you increased benefits and improved terms and conditions of employment if you refrain from supporting the Union.

WE WILL NOT threaten you with plant closure if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you, or denigrate the Union, by telling you the company is spending money on attorneys' fees to defend against unfair labor practice charges during difficult economic times.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT threaten you that you will be harmed if you select a union representative.

WE WILL NOT threaten you that engaging in union or protected, concerted activities could result in job loss.

WE WILL NOT lay you off or fire you because of your union membership, activities, and sympathies.

WE WILL NOT refuse to recall or rehire you because of your union membership, activities, and sympathies.

WE WILL NOT fail and refuse to recognize and bargain with the Sheet Metal Workers' International Association, Local 359, AFL–CIO as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unilaterally change your terms and conditions of employment without providing notice to and an opportunity to bargain with the Union, including:

closing the Tucson facility; laying off employees; recalling and rehiring employees, including determining the manner in which the recalls were to be effected; revising the implementation of the annual wage increase; and implementing and rescinding a safety incentive program.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the following provision in our employee handbook:

> **Appearance and Attire**
>
> Regardless of the work environment, provocative slogans or images on clothing, hats, etc., and revealing or impractical attire, is not appropriate.

WE WILL, within 14 days from the date of the Board's Order, rescind the following provision in our employee handbook:

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> **Confidential Information**
>
> Confidential information. Greenbrier's confidential and proprietary information includes (among other items) . . . personnel information . . . . Confidential information must be used only by authorized persons and only in accordance with Greenbrier policies and procedures.

WE WILL furnish all current employees with inserts for our employee handbook that (1) advise employees that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to all current employees a revised copy of our employee handbook that (1) does not contain the unlawful provisions, or (2) provides lawfully worded provisions.

WE WILL**,** on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time AAR write-up employees, airmen, laborers, material handlers, maintenance mechanics, painters, switchmen, and welder repairmen employed by the Respondent at its facility in Tucson, Arizona, excluding all other employees, including quality assurance inspectors, office clericals, guards, safety coordinators, and supervisors (plant managers, production managers, foremen, quality assurance managers, material managers, plant accounting managers) as defined in the Act.

WE WILL**,** on request, rescind any or all changes to your terms and conditions of employment that we made without first notifying the Union and giving it an opportunity to bargain, including: closing the Tucson facility; laying off employees; recalling and rehiring employees, including determining the manner in which the recalls were to be effected; revising the implementation of the annual wage increase; and implementing and rescinding a safety incentive program.

WE WILL restore the status quo ante by reestablishing and resuming operations at the Tucson, Arizona facility as they existed prior to the date of the facility's closure in October 2012.

WE WILL, within 14 days from the date of the Board's Order and to the extent that we have not already done so, offer the following individuals full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Alex Amador
Jesus Fernando Barnes
David Bottinueu
Oswaldo Chavira
Karim Duqmaq
Hector Federico
Jaime Hernandez
Jose Angel Ortega
Carlos Contreras Ortiz
Gabriel Ortiz
Brian Perona
Juan Silva Gutierrez
Guillermo Gonzalez Pico
Jesus Omar Ramos

Jesus Armando Lopez-Nuno	Jeff Raske
Jesus Martinez	Jesus Ruiz
Jorge Martinez	Oscar Salinas
Ricardo Martinez	Brian Scaggs
Karl Mason	Jose Manuel Sepulveda
Juan Morales	Rogelio Martinez
Chad Morshback	Frank Soto
Guillermo Murguia	Martin Valdez

WE WILL make the following employees whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest:

Alex Amador	Jose Angel Ortega
Jesus Fernando Barnes	Carlos Contreras Ortiz
David Bottinueu	Gabriel Ortiz
Oswaldo Chavira	Brian Perona
Karim Duqmaq	Juan Silva Gutierrez
Hector Federico	Guillermo Gonzalez Pico
Jaime Hernandez	Jesus Omar Ramos
Jesus Armando Lopez-Nuno	Jeff Raske
Jesus Martinez	Jesus Ruiz
Jorge Martinez	Oscar Salinas
Ricardo Martinez	Brian Scaggs
Karl Mason	Jose Manuel Sepulveda
Juan Morales	Rogelio Martinez
Chad Morshback	Frank Soto
Guillermo Murguia	Martin Valdez

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to our employees who were transferred, discharged, or quit due to our unlawful closure of the Tucson, Arizona facility, to their former jobs at the Tucson, Arizona facility, or if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole unit employees for any loss of earnings or other benefits resulting from our unilateral closure of the Tucson facility, less any net interim earnings, plus interest.

WE WILL compensate employees entitled to backpay for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and the unlawful layoffs, and WE WILL, within 3 days thereafter, notify the laid-off and discharged employees in writing that this has been done and that the discharges will not be used against them in any way, including in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

GUNDERSON RAIL SERVICES, LLC D/B/A GREENBRIER RAIL SERVICES

The Board's decision can be found at www.nlrb.gov/case/28-CA-093183 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

John Giannopoulos, Esq., Eva Shia, Esq. and *Sophia Alonso, Esq.*, for the General Counsel.

Frederick C. Miner and *Steven G. Biddle, Esq. (Littler, Mendelson, P.C.),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Tucson and Phoenix, Arizona, on various dates between September 17, 2013, and February 12, 2014. The Sheet Metal Workers' International Association, Local 359, AFL–CIO (Union or SMW) filed the first charges in Cases 28–CA–093183 and 28–RC–093179 on November 14, 2012. The Union filed the charge in case 28–CA–103909 on April 29, 2013 and the charge in case 28–CA–104184 on May 2, 2013. The charge in Case 28–CA–106613 was filed on June 5, and an amended charge in Case 28–CA–104184 was filed on June 14, 2013. The Union filed amended charges in Case 28–CA–093183 and 28–CA–103909, and a second amended charge in Case 28–CA–104184 on June 28, 2013. Also on June 28, the General Counsel issued a complaint consolidating Cases 28–CA-093183, 28–CA–103909, 28–CA–104184, and 28–CA–106613. The Union filed objections to the conduct of the elections on July 17, and on July 19, 2013, the Regional Director for Region 28 issued an Order Directing Hearing on Objections. This was consolidated with the other aforementioned cases on July 23, 2013. Gunderson Rail Services, LLC, d/b/a Greenbrier Rail Services (Respondent or GRS) filed a timely answer denying all material allegations and setting forth affirmative defenses.

The Union filed the charge in Case 28–CA–111186 on August 14, 2013 and the charge in Case 28–CA–112806 on August 30, 2013. The General Counsel issued a second complaint consolidating these cases with the previous cases on August 30, and the Respondent filed a timely answer on September 13,

2013. The Union filed another charge on September 6, 2013, and this was consolidated at the hearing with the previous complaints.[1]

The complaint alleges numerous violations of Section 8(a)(5), (4), (3), and (1), of the National Labor Relations Act (the Act) in connection with a union organizing campaign at the Respondent's Tucson plant between October 2012 and July 2013, and closure of the Tucson plant following an election. The allegations include interrogation, surveillance, threats, promises of benefits, implementation of benefits, and maintenance of unlawful policies, in violation of Section 8(a)(1). The complaint further alleges that the Respondent undertook a mass layoff, discriminated in its rehiring of some laid-off employees, and ultimately closed the Tucson plant, in violation of Section 8(a)(3), (4), and (1). Finally, the complaint requests a bargaining order pursuant to *Gissel Packing Co*., 180 NLRB 54 (1969), asserting that the Respondent's unfair labor practices have undermined the union's majority, making a fair election unlikely. In connection with this request, the complaint alleges numerous violations of failure to bargain in violation of Section 8(a)(5) and (1). In addition to the unfair labor practice allegations, the complaint was consolidated with certain objections to the election, many of which mirror complaint allegations.

On March 14, 2014, Senior U.S. District Judge for the District of Arizona Frank R. Zapata issued an order granting the General Counsel's petition for a temporary injunction pursuant to Section 10(j) of the Act. Among other relief, Judge Zapata's order granted "interim restoration of Greenbrier's operations at its Tucson facility and an interim *Gissel* bargaining order directing Greenbrier to bargain in good faith to an agreement or an impasse over the terms of a labor agreement, or a lawfully motivated reason to move the Tucson facility." Case 4:14-cv-01323-FRZ (Mar. 14, 2014). The Respondent's emergency motion for a partial stay of the temporary injunction pending appeal was subsequently denied. On April 23, 2014, the Court of Appeals for the Ninth Circuit denied the stay request and ordered Greenbrier to comply with the District Court's order, as clarified, by no later than May 5, 2014.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with a place of business in Tucson, Arizona, repairs and performs maintenance on railcars. It annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Arizona. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Respondent's Operations

Gunderson Rail Services, LLC, d/b/a Greenbrier Rail Services (GRS) is a stand-alone subsidiary of Greenbrier Companies, Inc., a publicly traded company headquartered in Lake Oswego, Oregon. This case concerns GRS's railcar repair facility in Tucson, Arizona, which is part of GRS' wheels, repair and parts division.

GRS employees at the Tucson facility repaired and performed maintenance service on railcars.[2] Lex Morrison served as the plant manager in Tucson from September 2008 until November 12, 2012, when he was demoted to production manager and relocated to Washington.[3] Following Morrison's departure, Juan Maciel, who was a general manager, took on the additional and concurrent role of interim plant manager for the Tucson facility on November 13, 2012. Maciel served as interim plant manager until Eric Valenzuela assumed the position as plant manager for the Tucson facility on March 4, 2013.[4] Plant managers normally report to the general manager, but in Tucson, the plant manager initially reported to the regional manager, Gordon Hudgens. Kevin Stewart assumed the role of general manager with oversight of the Tucson facility on March 30, 2012, after which time the plant manager reported to him. (Tr. 292; R. Exh. 38.) Danny Dicochea, who was the quality control manager, also reported to Stewart. (Tr. 1234.) During the relevant time period, Hudgens spent most of his time at the Mira Loma, California facility and visited Tucson a couple times a year. (Tr. 1515.) Stewart's office was in Chehalis, Washington, and he visited the Tucson facility a couple times a month for a couple of days per visit. (Tr. 1242.)

The regional managers report to the vice president of operations who, during the pertinent time period was Gerald Michael Torra. He reports to William Glenn, the chief commercial officer.

In Tucson, Freddy Valdez was the production manager until he went back to his previous position in writeup near the end of May 2013. (Tr. 1773–1774.)

Al Lave was the vice president of human resources (HR) for GRS from June 2011 to December 2013. He oversaw the repair shops in the US, Canada, and Mexico, which were comprised of approximately 1,200–1,300 employees. A benefits administrator worked in the corporate office in Lake Oswego, Oregon, with him and reported directly to him. Four regional managers also reported directly to Lave: two in San Antonio,

[1] A final version of the complaint, including amendments granted at the hearing, is in the record as General Counsel's Exhibit 287. Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R. Br. for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

[2] At the time of this decision, the Tucson shop had been closed, but was ordered reopened pursuant an injunction filed under Sec. 10(j) of the Act.

[3] At the time of the hearing, Morrison had been terminated from GRS.

[4] Maciel retained his position of general manager while serving as Tucson's interim plant manager.

Texas, one in Omaha, Nebraska, and one in Chicago, Illinois. Larger repair shops have an HR generalist who reports to regional HR manager with a dotted line to plant manager. At all relevant times, Lisa Maxey was regional HR manager responsible for the Tucson facility. She spent about a week per month in Tucson. (Tr. 1593.) The HR generalist in Tucson was Margaret Madrigal until she was terminated in November 2012. Christine Martinez (C. Martinez) served as the HR generalist from December 2012, until September 5 or 6, 2013. (Tr. 144–45, 1545.) The HR generalist was responsible for maintaining employee personnel files. (Tr. 368, 371.) Julio Vasquez, the safety manager, maintained employee safety files. (Tr. 369, 372.)

GRS operates on a fiscal year that begins on September 1 and ends on August 31.

1. The Tucson facility

GRS owns some of its repair shops and leases others.[5] It owns the Tucson facility, which is one of the larger facilities. GRS also owns much of the equipment that was used in Tucson.

TTX, a railcar pooling company,[6] which is owned by the Class I Railroads and has a fleet of over 200,000 railcars, was GRS's largest customer, and comprised 70 to 80 percent of the business in the Tucson shop. GRS also had an agreement with Pacer to have their cars repaired in Tucson's intermodal shop. (Tr. 2529, 2645.)

When a car came to the Tucson shop for service, writeup[7] employees inspected it to determine what repairs, parts, and materials were needed. They also estimated the number of hours the repairs would take and entered this into a system that tracked employees' time spent on the cars. Switchmen then took the cars on and off the tracks for repair.

Welder repairmen, often referred to simply as welders, serviced and repaired the cars. Most cars were repaired in the front shop, center shop or intermodal shop. Heavier repairs, such as rebuilding a car after a derailment, were handled in the wreck shop. Cars that needed to be painted were sent to the paint shop. If a component of car needed repair, it was sent to the truck shop for reconditioning. Painters sandblasted areas of cars that needed paint, then painted the cars and applied stencils and decals. Airmen worked on the cars' air brake systems. Some employees were cross-trained to perform more than one function. Leadmen oversaw the crews and performed work on the floor.[8] The leadmen reported to foremen, who oversaw the shops and reported to the plant manager or production manager. Once work was performed on a car, quality assurance inspectors assessed it to make sure it was complete before it left the shop. Maintenance cars had a turnaround target of 30 days and repair cars 150 days. (Tr. 1067.)

Each employee had an individual ID card and each car was assigned a number. When an employee was assigned to work on a car, he scanned his ID card and entered the car's assigned number. That employee's time was applied to that car until he clocked out or entered information for a different car. Production reports showed the customer, the type of car, the hours allotted to the car, and the hours worked on the car. If an employee was not working productively, the leadman would bring it to the attention of a supervisor or a manager. In such cases, management would look at the production report for that employee. (Tr. 90–93.)

Employees who do the work on railcars are referred to as direct labor. Employees who perform other tasks are called indirect labor. In addition to the writeup employees and supervisors/managers, other employees who did not work on cars included materials handlers, who received parts and material for the cars and distributed them. A materials manager oversaw them. A maintenance man reported directly to the maintenance manager. Tucson also had a plant accountant.

The plant manager was in charge of staffing the Tucson facility. Beginning in 2009 or 2010, GRS began using a temporary employment agency, Intermountain Staffing (Intermountain), for many of its hires in Tucson.[9] Marissa Almazan, branch manager at Intermountain, coordinated with HR to provide the Tucson shop with temporary employees. Almazan initially worked with Madrigal, and then after Madrigal was terminated, she worked with Maxey. (Tr. 901.)

Intermountain used GRS applications when it was staffing temporary workers for GRS. When the plant manager wanted an employee to be hired through Intermountain, HR would ask for a few completed applications. The plant manager would then decide who he wanted to interview, and HR would set up interviews. (Tr. 362, 903; GC Exh. 31.) The plant manager, production manager, and usually a foremen conducted interviews and decided whether to hire a candidate. HR let candidates know if they were chosen and conducted new employee orientation. The temporary employees received the same orientation and safety training as direct hires, which consisted of acknowledgement of the employee handbook along with 4 hours of instruction with the HR generalist and 4 hours with the manager. (Tr. 359–368, 435, 449.) Once they started at GRS, temporary employees' work was overseen by GRS supervisors. (Tr. 88–89, 369.) Any disciplinary issues were communicated

[5] GRS owns the repair shop in Chehalis, and leases the San Antonio, Springfield, Cleburne, and Mira Loma facilities. (Tr. 1523–1524.)

[6] The transcript reflects "pulling" rather than "pooling" but this is clearly one of its many errors. In addition, "TTX" is frequently referred to as "DTX" or other incorrect variations. All transcripts have a few errors, but this transcript contains an unacceptably large number of errors, both in terms of using incorrect words and misidentifying who is speaking. I did not receive a motion to correct the transcript from either party. If the error is significant it will be pointed out, as here. It is my strong hope that the abysmal state of this transcript is a one-time anomaly.

[7] Writeup employees are sometimes referred to as "AAR writeup employees" in both testimony and documents. The abbreviation "AAR" was defined in a different context as standing for "American Association of Railroads."

[8] The Respondent contends that leadmen are statutory supervisors Leadmen issue oral and written warnings, give meaningful input into promotions, effectively recommend discipline, assign and direct work in a manner that utilizes independent judgment, authorize overtime, and attend supervisor meetings. (Tr. 1158–1170, 2392–2393.) As such, they meet the criteria to be considered supervisors under Sec. 2(11) of the Act.

[9] Madrigal recalled it was 2009; Marissa Almazan from Intermountain thought it was 2010. (Tr. 361, 899.)

to Intermountain for handling. (Tr. 368–371.) The temporary employees were eligible to be hired after 90 days, at which point the foreman would share his assessment of the employee with the plant manager. The decision to terminate or to retain a temporary employee was entirely GRS'. (Tr. 449.)

A temporary employee hired on as a permanent employee filed a new application and went through the new employee process all over again, but was not re-interviewed. (Tr. 448–449.) Attendance was wiped clean for temporary employees hired as GRS employees. (Tr. 461.) Employees did not have to fill out a new Greenbrier application for Intermountain each time they were referred to work for Greenbrier. (Tr. 923.)

Foremen, were expected to do employee performance appraisals twice per year. Employees performed self-assessments which were reviewed by the plant manager, foreman and employee. The employee, foreman, and the HR generalist or regional HR manager signed off on the review.[10] (Tr. 376–379; GC Exh. 32.)

2. Background events in 2011

In late 2010, welder repairman Rogelio Martinez (R. Martinez) started talking about bringing in a union. In 2011, production employees R. Martinez, his son Jorge Martinez (J. Martinez), and Armando Lopez, led a campaign to bring in the United Transport Union (UTU) to represent the production workers in Tucson. Plant Manager Morrison recalled that employee Anajos Juarez was also a vocal supporter. (Tr. 115.)

J. Martinez received a written warning on August 12, 2011, for soliciting employees about the union during work time. (Tr. 1406; GC Exh. 8.) R. Martinez received a written warning four days later for soliciting employees about the union during work time.[11] (GC Exh. 37.) Madrigal recalled that three employees, Gaston Ortiz, Rudy Pierson, and one other reported R. Martinez, saying he was being very pushy. (Tr. 412–13.) Madrigal also recalled that Armando Lopez and two other employees were disciplined in 2011. (Tr. 414–415.) According to welder Omar Ramos, prior to the 2011 election, his leadman Rudy Pierson pulled him aside and told him to stay away from R. Martinez and another individual because GRS wanted to get rid of them for trying to bring in the Union. (Tr. 1730, 1747.)

Prior to the election, between June and October 2011, Lave conducted several meetings at the Tucson facility with employees and managers about the UTU organizing drive. (Tr. 210–11; 417–420.) R. Martinez recalled that during some of the meetings GRS officials threatened to close the company down, transfer employees to another state or lay them off/fire them. (Tr. 1376–1377.)

In summer of 2011, due to GRS' transition to the E-verify system to screen for undocumented workers, Greenbrier conducted an audit of employees' social security numbers. About 85 employees, 13 of whom worked in Tucson, did not match and were therefore ineligible to work. (Tr. 2597.) Seven welder repairmen, three foremen, a quality assurance inspector, a leadman, and a writeup employee were ineligible to continue working. These employees averaged over nine years of service each. (R. Exh. 96; Tr. 2689.) The ineligible foremen were the three most senior at the shop. There were only two quality assurance inspectors at the time, and the ineligible writeup worker was the only one at the Tucson shop at the time. (Tr. 2690; R. Exh. 97.)

The UTU lost the election by three votes on October 28, 2011.

B. Big 5 Recovery Plan and Early Organizing Activity

Toward the end of 2011, Paul Wostman, the vice president of business development, was charged with implementing an initiative goal to turn around five repair shops that were underperforming. Referred to as the "Big 5 Recovery Program", the initiative targeted shops in San Antonio and Cleburne, Texas; Omaha, Nebraska; Chehalis, Washington; and the Tucson shop.[12] (Tr. 95–96, 2696–2697, 2728.) These shops were some of the larger ones and were adversely impacted by the social security audit. (Tr. 2696.) In addition to problems from the immigration audit, Tucson struggled because the types of repairs being requested made things less efficient. (Tr. 97–98, 128–129, 139–141.)

Hudgens sent Wostman Tucson's hiring plan on December 14, 2011. The goal was to increase labor headcount from 74 to 95 by July in order to increase revenue and profit margins. (R Exh. 98.) Wostman and Lave reviewed progress for each facility to meet monthly goals to increase headcount and meet efficiency goals.[13] (Tr. 2598–2599; R. Exhs. 81–86.) They were trying to hire 2–3 employees per month. Tucson was not able to meet its monthly hiring goals, and efficiency suffered because Morrison had to focus more time on training a relatively inexperienced work force. (R. Exhs. 49, 84.)

After becoming the general manager with oversight of Tucson in the spring of 2012, Stewart began regular visits to the Tucson facility. During one of Stewart's first trips to Tucson, Morrison informed him about the 2011 UTU union campaign. (Tr. 2362–2363.) Also during one of Stewart's first visits, he and Maxey held communication meetings with all of the hourly employees. The purpose was to let the employees communicate any problems or concerns. (Tr. 2248–2249.) He was aware Tucson had problems the previous year.[14] (Tr. 2363.) Stewart recalled a lot of feedback about not having the right tools or equipment. Stewart brought the tool issues to Torra's attention around April or May 2012, and GRS ordered some tools and equipment. (Tr. 295–306.)

[10] This practice changed shortly after Maxey came on board.

[11] On both warnings, the employer failed to indicate whether or not there had been previous or similar warnings, as neither the "yes" nor "no" box is checked. It was common for employees to discuss nonwork topics such as sports and family. (Tr. 607, 880.)

[12] In mid-September 2012, the International Association of Machinists and Aerospace Workers did some campaigning at the Respondent's Chehalis facility. No representation petition was filed. (Tr. 165.)

[13] Mr. Wostman developed "scorecards" to track performance. The scorecards tracked financial statistics for the facilities, and were distributed at monthly meetings with GRS President Tim Stuckey. The plant manager could enter comments to explain the statistics. (Tr. 2701–2704, 2713–2716; R. Exh. 9.)

[14] Tucson made $654,000 in fiscal year 2011. (GC Exh. 265.)

Employees also complained about errors in assigning attendance points and paid time off (PTO).[15] (Tr. 2248–2249, 2341–2342.) The Respondent uses a system called Kronos® (Kronos system) for tracking employees' time and attendance. Management was required to manually input the reason for an absence in order for attendance points to be tracked accurately. Foremen were supposed to do this, but they had problems using the system so Madrigal input the information for them. If a foreman did not communicate that an individual who was absent had called in, the absence would default to a no-call/no-show. (Tr. 388–393.)

Madrigal recalled Maxey performed an audit of the employees' attendance points shortly after Maxey began working for GRS in April 2012. As a result of the audit, about five or six employees had their attendance adjusted. (Tr. 393, 453.)

Stewart brought individuals in from Chehalis, Washington to train the people in Tucson. Labor utilization rates for Chehalis and Tucson were each at 59 percent in April 2012, which was 22 percent under goal. In May, the labor utilization rate for Chehalis was 56 percent, which was lower than Tucson. (GC Exhs. 263, 264; Tr. 2351–2353.)

There was some restructuring of Tucson's writeup department during summer of 2012, and some other positions and supervisors were moved around to better align employees' skills and expertise. Stewart told Maxey and Morrison that writeup employee John Anderson would become the AAR billing supervisor, but he was not going to change his job title for a couple of months. Some employees had not been entered into Kronos correctly, so part of the review was to ensure each employee was reporting to the right supervisor. In addition to these changes, Julio Vasquez was hired as the environmental health and safety (EHS) manager to replace the prior safety coordinator who had been terminated. Two mechanics were also hired and reported to Vasquez.[16] (R Exhs.42–43, 47; Tr. 2265.) There was some improvement following the changes but it was not significant enough in Stewart's eyes. (Tr. 2268.)

Kathy Villalobos, the plant accountant, reported to Stewart that during the month of July 2012, the Tucson facility lost $4,418 (R. Exh. 45; Tr. 2270.) In August, the Tucson shop lost $156,405.[17] (R. Exh. 49.)

Through mid and late August, GRS was still planning to hire more employees at the Tucson facility and it was identified as a "fix-it" facility. The goal was to increase headcount to 95 by August 31, 2012. The goal for San Antonio was to increase headcount from 50 to 70. (GC Exh. 64; Tr. 559–561.)

On September 12, 2012, management noticed Tucson's utility bill was excessively high. This was the result of two air compressors with poor air line conditions. Stewart wanted to have some compressed air companies come in to try to find a solution, but he did not have the funds in 2012, so this did not occur. (R. Exh. 46; Tr. 2274–2275.)

On September 14, Lave sent an email to Maciel, Stewart, and Hudgens, among others, asking about the goals. He specifically asked Stewart for an explanation for missing the Tucson headcount by 22, and asked Maciel to explain why the San Antonio headcount was 12 short of target. (GC Exh. 205.)

Gonzalez-Pico (Pico) got a written warning for violation of the attendance policy on September 25, 2012, Guillermo. He had nine points as of September 24. (R. Exh. 73.)

In preparation for an executive team meeting where he would be defending the Tucson shop's performance, Torra requested information from Stewart. (Tr. 2280, 2429.) On September19, Stewart sent Torra an email, cc'd to Morrison and Hudgens, about steps that had been taken to improve in five key areas: safety, turnover/retention, quality, productivity, and inventory management. He noted that the changes would provide sustained improvement in all areas, but it would take some time, and he would expect to see improvement in the first quarter, with more significant improvement through the remainder of fiscal year 2013. (R. Exh. 47; Tr. 2349.) He also sent an email with financial data, noting some of the problems in July and August. (R. Exh. 48.) Morrison informed Stewart that their labor rate was $63 and their efficiency was 89 percent. (R. Exh. 47.)

Torra participated in an executive meeting on September 20 with Chief Executive Officer (CEO) Bill Furman, the division presidents, including the President of GRS Tim Stuckey, and Greenbrier's Chief Financial Officer (CFO) Mark Rittenbaum. They discussed the shops performing poorly, including Tucson. Torra described the cause of Tucson's poor performance as "very poor processes." There was a directive to fix, sell, or close under-performing shops, including Tucson. Management agreed to a proposal to fix Tucson. (Tr. 2430–2433.)

In September 2012, employees were provided with a free lunch to celebrate a month without accidents and coming out ahead in terms of productivity. (Tr. 1479.)

Stewart approved a pay increase for Jaime Hernandez on September 8, 2012. Morrison conveyed to Stewart that Hernandez had worked for GRS from 1995 until 2002, and then was rehired in 2010. Hernandez' foreman said he was one of his strongest men, he "has never complained about his wages" and "does everything he is asked to do and does it well." Maxey was copied on the approval. (GC Exh. 9, 10; Tr. 135.)

Also in September, J. Martinez began to have conversations with coworkers about the need to organize. They discussed safety, wages, insurance, and working conditions. J. Martinez called the United Food and Commercial Workers Union (UFCW) and set up a meeting to discuss organizing GRS' production workers. (Tr. 744, 1292.) On October 24, 2012, J. Martinez and welder Guillermo Murgia met with UFCW official Efrain Sanchez. They both signed UFCW authorization cards at the meeting. (Tr. 693–694, 1291–1292; GC Exh. 82, 169.) J. Martinez and some other employees passed out cards

[15] He tried to hold these meetings quarterly and could recall two more following the initial one. The subsequent meetings were much quicker. (Tr. 2251–2252.)

[16] Torra also said the decision was made to replace Morrison as plant manager during the summer of 2012, though as discussed more fully below, this did not take place until November. (Tr. 295.)

[17] The repair shop in Atchison, Kansas, lost over $250,000 in August. (Tr. 2422; GC Exh. 270.) For fiscal year 2012, there was a $400,000 difference between cost of sales and total revenue for Tucson and San Antonio. (GC Exh. 272–273; Tr. 2494.) Other facilities may have experienced losses similar to Tucson in fiscal year 2012. (Tr. 2418–2419.)

for the UFCW in late October and returned about 48 cards to Sanchez. During this time period, front shop Foreman Martin Torres asked J. Martinez if the union was "coming around again." J. Martinez said he did not know, and when asked why he was asking, Torres replied there were "rumors . . . that had been heard." (Tr. 1294–1297; 1438–1443.)

As of October 2012, the Tucson shop was hiring because it was still behind on meeting targeted headcount goals. According to Morrison, workflow was low, but they were trying to get work into the shop and wanted employees in place when work became available. (Tr. 86, 97.) According to Torra, there was no decline in demand for work at the Tucson shop, just a decline in the output. (Tr. 307.)

Also during October, Lave and Morrison discussed that it had been almost a year since the UTU election, and the 1-year ban on a union election was set to expire.[18] Given how close the vote was, Lave thought there might be new organizing efforts. (Tr. 214.)

On October 18, 2012, Maxey sent Madrigal an email about evaluations for October. Employees were rated on a scale of 1–3. A score of 1 meant the employee needed improvement, a score of 2 meant the employee was meeting requirements, and a score of 3 meant the employee excelled. She asked why Murguia got good marks and whether Martin, the reviewing foreman, was confused about his rating. She further noted that Murguia should have gotten a 1 on attendance because he had 6 attendance points. Maxey also questioned Jorge Maldonado's rating, stating that Martin noted he needed more work on welding but gave him good marks. Maxey pointed out that that Jesus Lopez had 3 attendance points so he should have gotten a 2 instead of 1 on attendance. She opined that Oscar Salinas needed to improve on safety but he got a 2 where he should have received a 1. She noted Valdez had sent her a disciplinary action on him that day, so he have received a 1. Maxey expressed a general concern about the lack of 1s in employee appraisals. (R. Exh. 75.)

Lave met with the managers, supervisors, and leads on October 31, 2012, at the Tucson facility to inform them it had been a year since the union's organizing efforts. Madrigal was also present. Leadman Antonio Acuna recorded the meeting. (Tr. 1152; GC Exh. 151.) Lave told them to keep eyes and ears open and said there had already been chatter about another organizing effort. (Tr. 120–121; 197, 212–213.) He stated that "some conversation are already going on out in the shop" about production employees being aware that "the one-year ban is off, so there is already some discussion out there in the shop about trying to bring the UTU or some other union back in," and that the Company knew employees were "somewhat active." (GC Exh. 151.) He noted that leadman or foreman had heard talk about the Union coming back, and reiterated that the philosophy of company was nonunion. (Tr. 122–123.) During the meeting, one or two supervisors shared that they had heard from someone on the shop floor that one or two employees had been meeting offsite with a union person. Lave instructed the supervisors and managers that if they saw any union materials, they should give them to Morrison. He also told them to report any union discussions to Morrison and to let him know if they saw anyone at the gates or in the lunchroom. (Tr. 216– 218.)

At the time of the meeting, Acuna knew there was another organizing effort but because he had become a leadman since the previous campaign, he didn't want anything to do with it. (Tr. 1151.) Armando Lopez, one of the leaders of the 2011 campaign, had also since become a leadman in the truck shop. J. Martinez spoke with Armando about the Union, updating him about the process, including how many cards they had. (Tr. 1378.) J. Martinez also told his leadman Cesar Ledezma about the organizing campaign in mid-October. (Tr. 1429.) Juan Silva Gutierrez (Silva) spoke regularly with leadmen Ishmael Lopez and Luis Lopez about the Union. He told Ishmael he hoped the union would win the election and bring about changes. (Tr. 653–654, 825.)

C. October 2012 Financial Losses and Response

Tucson's financial data for October was very poor. A review of the financial statements showed a negative of $185,000 in "Direct Labor Applied to Jobs" whereas in September this was zero. Money spent on repair and maintenance of equipment and supplies rose roughly $40,000 from September to October, and money spent on office supplies rose by more than $5000. An Association of American Railroads (AAR) audit created an unusual $5400 expense. Roughly $9,400 was spent on hazardous waste disposal in October and no money was spent on this in September. Other costs, such as overhead applied to jobs and travel expenses, may have been inaccurate because of the change to Syspro. (GC Exh. 266; Tr. 2366–2371.)

In late October, general managers and regional managers participated in a financial call. They discussed the fact that Tucson's performance was unacceptable and the contributing factors. Torra said he could no longer defend the facility. Problems were the mix of work from the customers, the plant manager's poor management, issues with tools and equipment, the division of the facility into four shops, failure to follow processes and procedures, and a relatively inexperienced work force. Specifically, with regard to mix of work, there were too many cars needing relatively light work as opposed to a mix of cars needing light and heavy work.[19] Layoffs were not discussed during this call but they discussed need to replace the plant manager as well as the need to come up with a plan to turn the shop around quickly. (Tr. 1236–1245.) According to Stewart, he and Maciel, who was also on the call, were charged with devising a plan to present at the plant managers' meeting in Chicago scheduled to take place November 5–7. (Tr. 1246, 2313.)

On October 31, Stewart sent an email to Torra and Hudgens, cc'd to Morrison, regarding a $250,000 shortfall of the net earnings target for October. He attributed $65,000 to a change in how overhead rates were applied in Syspro and $50,000 in unusual expenses. The remainder was because of 56 percent

[18] Sec. 9(c)(3) of the Act forbids the direction of an election for any bargaining unit where a valid election was held the previous year. See 29 U.S.C. § 9(c)(3).

[19] The monthly scorecard attributed the losses to a poor work mix, poor initial write-ups, poor efficiencies, and materials issues. (Tr. 2297–2301; R. Exh. 49.)

labor efficiency, i.e., proportion of billed hours versus total hours worked, and 72 percent billing efficiency.[20] Stewart noted that the more they worked, the more they lost. (R. Exh. 50.) In a November 1 email, GRS' Vice President of Finance, Todd Abel, informed Stuckey that for every hour worked, the company lost money. He noted that the Dothan, Alabama, and Atchison, Kansas facilities were also expected to miss the plan badly. He pointed out it was Tucson's first month on Syspro so hopefully things could turn around. Stuckey informed Torra (among others) that it was time to "step up or step down" and stated they needed to act decisively NOW" and "get intense quickly" to "stop the bleeding" in Tucson. (R. Exh. 64.) On November 5, Torra asked Abel for a rough estimate of the costs to close the Tucson facility. The cost to close Tucson would have been at least $5.3 million in property, plant and equipment, which Torra determined was too expensive. (Tr. 2438–2439; R Exh. 65.)

Stewart said that prior to the meeting in Chicago, he and Maciel identified that the front and center shops were best suited for the work that was coming in to Tucson and looked at what work force the buildings would support. They conveyed this to Torra in Chicago, as discussed below. Maciel initially stated he and Stewart decided they would downsize the work force in Tucson in late October, but when reminded of the conference, he said he learned of it at the conference. (Tr. 1046–1049.)

Labor utilization rates in San Antonio for August, September, October 2012, ranged from 41 to 46 percent. (GC Exh. 282; Tr. 2746–2747.) As of November 2012, San Antonio, Tucson, and Atchison were all on the "fix" list. (R. Exh. 65; Tr. 2438–2444.) As of October and November 2012, the Tucson shop was still hiring welders and other employees through Intermountain Staffing. (GC Exh. 33–36; Tr. 399, 409–410.)

D. Concurrent Events in Early November

1. Organizing

In early November 2012, Sanchez told J. Martinez that the Sheet Metal Workers Union was more in line with the work the GRS employees performed, so he arranged for them to meet. (Tr. 1297.) J. Martinez, R. Martinez, and Murguia went to the Sheet Metal Workers' office on November 5. Greg Sudyam, marketing representative for the Sheet Metal Workers Union, was present along with business manager Dion Abril and business representatives Pat Montroy, Marco Molina, and Jeff Holly. Sanchez also attended. (Tr. 1446.) J. Martinez, R. Martinez and Murguia each signed Sheet Metal Workers authorization cards and took cards to pass out to their coworkers. (Tr. 695, 1408–1409, 1822; GC Exhs. 83, 170, 201.) About a dozen other employees also went to the November 5 meeting, but no managers, foremen, or leadmen attended. (Tr. 697, 748–750.) The organizers wanted to keep the organizing efforts a secret.[21] (Tr. 756.)

The following day, J. Martinez passed out SMW authorization cards to coworkers in the intermodal shop, wreck shop, and lunch room. He told coworkers to read the cards and sign if they agreed, and watched them initial and sign the cards. (Tr. 1302–1321.) He explained that the cards would give authorization for collective bargaining and if 30 percent returned cards, they could petition for an election and would then need a majority to win. (Tr. 1446–1447.)

Ramos talked to coworkers around the truck shop area during lunch and breaks, and passed out SMW authorization cards in the lunch area and by the time clock. He explained the consequences of signing a card as being represented by the Union and having a better chance at job security. (Tr. 1712–1716.) Ramos spoke to employee Brian Perona in October 2012 about the SMW, but Perona said he did not want to get involved because when he worked for GRS in California, some employees who tried to bring in a union got fired. (Tr. 1755.)

Murguia passed out cards to coworkers before and after work. He told coworkers to read the cards carefully and to sign if they wanted the SMW and not sign if they didn't. The following employees filled out SMW cards in his presence: Jesus Nuno, Alex Amador, Jesus Arellanes, Jorge Maldonado, Adolfo Alonso, Jesus Lopez Nunez, Juan Manuel Enriquez, Jesus Peralta, Jaime Hernandez, Jesus Ruiz, Jesus Barnes, Pedro Contreras, Javier Madrid, Roberto Ruelas, Jesus H. Lopez , Ramon Parra, Engenio Ruiz, Jose Barcelas, Everaldo Andolon, Jeff Raske, and Guillermo Gonzales Pico. (GC Exh. 84–123, 130.) Ramos also signed a card and gave it to R. Martinez. (Tr. 1717; GC Exh. 223.) Pico collected cards from Alberto Salas and Oscar Lopez and gave them to J. Martinez (GC Exhs. 131–133; Tr. 876–877.) Angel Ortega, Victor Sigueros, Alcides Valencia, Cilboto Milton, and Jose Soto signed cards on November 6. (GC Exhs. 236–245; Tr. 1720–1727.) Ricardo Martinez signed a card on November 7. (GC Exh. 149; Tr. 930–931.) Oswaldo Chavira Duran (Chavira) signed a card on November 7. (GC Exh. 234; Tr. 1718.) Miguel Valdez, Arturo Sanchez, Eliseo Aguilar, Angel Amavizca, Jesus Martinez, Gabriel Ortiz, Javier Garcia, Michael Robles, and Eddie Duarte, signed cards on November 6 and gave them back to J. Martinez. (Tr. 1307–1321; GC Exhs. 170–187.) He collected a card signed by Gamaliel Rabago on November 8, though it was mistakenly dated as "11/16."[22] (Tr. 1322–1324; GC Ehxs. 188–189.) J. Martinez also collected from Ricardo Castro and Carlos Ortiz on November 8. Rabago gave Jorge Martinez cards from Martine Martin and Brian Scaggs. Juan Silva signed a union card on November 7, and Hector Federico also signed a union card. (GC Exh.78; Tr. 595–596, 650.) Managers were not present when employees signed the SMW cards. (Tr. 763.)

J. Martinez, R. Martinez, and Murguia gave the cards to the Union at a meeting on November 8. (Tr. 1337.) Sudyam re-

[20] The American Association of Railroads has industrywide matrix, the Office Manual, with standard number of hours that can be charged for different work performed. Billing efficiency rate is number of hours worked measured against number of hours that can be billed for the work performed. (Tr. 1500–1501.)

[21] Union supporters did not wear union insignia at work or otherwise advertise their support for the SMW or any union.

[22] It is clear from the date stamp on the card showing its receipt at by NLRB as November 11, that it was not signed on November 16.

called the SMW collected a total of 51 cards. He made copies of the cards and put them in a safe with the intention of sending them to the NLRB with a petition. (Tr. 1825–1828.) As of November 8, there were 84 production employees, 10 of whom were temporary employees. Not counting cards from temporary employees or leadmen, there were 46 signed authorization cards. (GC Exhs. 25, 15.)

During the week of November 5, Madrigal heard from materials manager Keith Tarpley that there was talk of the union coming back. The same week, Vasquez also told Madrigal that a lot of employees were saying the Union was trying to come back. She planned to let Morrison know about it when he returned to the Tucson shop on November 12. (Tr. 421–422.)

The morning of the layoff, Murguia recalled Foreman Martin Torres told him "it looks like they were going to lay people off from work because the situation was looking pretty bad." He also said he "thought that it was because of the Union." (Tr. 739–740.)

2. Plant manager's conference and layoff planning

There was a plant manager's conference in Chicago on November 5–7. Lave, Hudgens, Stewart, and Maciel attended, among others.

During one of the evenings of the conference, Stewart and Maciel met with Torra and possibly Hudgens at a bar to discuss right-sizing Tucson Maciel and Stewart said their plan was to close all but the two original shops, the front shop and center shop, and to reduce the work force accordingly. Torra said to do it and clear everything with Lave. (Tr. 299, 1236, 1245–1248; 2313–2316, 2361.) The meeting lasted about an hour and no written documents were presented. (Tr. 2361–2362.)

Torra had ultimate decision-making authority regarding downsizing the Tucson shop. His decision to lay off employees was the result of discussions with Maciel and Stewart. They determined there was a "process issue" so to fix the process it made sense to consolidate operations. They had tried to increase volume of the shop by hiring more employees, buying some new equipment, and making management changes, but these efforts did not work. (Tr. 287–292.) Torra told Maciel and Stewart to consider skill and ability, per their assessments, in determining which employees to layoff. (Tr. 309, 333.) Torra said he was unaware there was a union campaign going on at the Tucson facility. (Torra 310–311.)

Stewart began executing the plan by selecting the management staff and identifying the appropriate number of direct workers and support positions. (Tr. 2314.) He and Maciel determined they would need 56 direct and 19 indirect employees. (Tr. 1057, 1063, 2323; GC Exh. 15; R. Exh. 52.) Stewart came up with the number of employees based on the number of car spots in the two facilities that were to remain open along with the hours of work and mix of cars. (Tr. 1252–1253.) Maciel did not discuss workload with Stewart prior to coming up with this target headcount. (Tr. 1065.)

According to Maciel, he and Stewart started working on the plan when they got back from Chicago. They requested a list of employees from Maxey, which she provided on November 7. The list contained each employee's id number, seniority date, last hire date, position, supervisor and pay rate. (GC Exhs. 157, 227; Tr. 1056.) By Stewart's account, Maciel selected who would be retained as part of the direct work force on November 8, based on which employees had the skills they needed to perform the work coming from TTX. (Tr. 1258.) Stewart was not familiar enough with the direct work force to know the employees' skills. (Tr. 2316–2317; R. Exhs. 51, 54.) Stewart recalled Maciel telling him he spoke with production manager Valdez and Valdez's predecessor Jerry Dover to determine which employees to keep. (Tr. 1256–1257.) Stewart did not review personnel files. (Tr. 1259.)

Maciel recalled that he and Stewart went down the list employee by employee to decide who they wanted to retain. Maciel decided who to let go based on feedback from Stewart and Valdez. (Tr. 1059–1062.) The factors they considered were the employees' skills, performance, safety, and cross-training. They had no input from supervisors or foremen. Maciel did not review any documents such as attendance records or performance evaluations. (Tr. 1052–1055.)

Valdez testified he was not asked about any individual employee's performance or whether any individual employees should be laid off or retained. (Tr. 1803–1804). He first learned about the layoffs the day they occurred, during a group meeting of employees who were told they were being retained. (Tr. 1801–1804.) Morrison was not asked to run any reports prior to November 2012 layoffs, nor was he asked who had high productivity or good attendance. (Tr. 133–134.)

Hudgens did not recall talking about the layoffs at the conference in Chicago, stating that the general managers went around him and dealt directly with Torra. (Tr. 1492–1493.)

Stewart informed Lave of layoffs at the conference on November 7. He told him the shop was continuing to lose money and the operations team had decided to restructure it by changing the plant manager, laying out the shop differently to address inefficiencies, and reducing the headcount because there was a lack of railcars. (Tr. 151.) Stewart also informed Lave that Jack Lopez, the quality assurance inspector, and Madrigal, the HR analyst, were being removed. (Tr. 172.) That same day, Stewart sent an email to Maxey and Lave, cc'd to Maciel and Hudgens, with a directive to hold off on new hires because of the impending layoffs. (GC Exh. 70; Tr. 578.)

Maciel and Stewart decided that employees needed to be let go on November 12. (Tr. 1053.) Lave learned that November 12 would be the date of the layoffs on November 8 or 9. (Tr. 156.)

On November 8, Stewart sent Maciel an email, cc'd to Hudgens, entitled, "fill in the blanks" stating that they just needed to finish filling in 56 direct and 19 indirect employees. Hudgens responded that it would be easy to figure out how many hours they could bill with this headcount, and asked if one of them was going to estimate which fixed costs could go down with this headcount in order to get to a break-even point. (GC Exh. 204.)

Madrigal was not asked to pull attendance records, performance reviews, disciplinary records, or personnel files prior to the layoffs. Personnel files existed in hard copy only and were maintained at the Tucson facility. (Tr. 389–396.) According to Maxey, to assess performance, they used just "general information about employees' performance." (Tr. 1628.) Maxey

recalled giving attendance reports to Stewart, Maciel, and Lave. (Tr. 1626.) Lave did not know the number of attendance points the employees had. (Tr. 181.)

On Saturday, November 10, Lave reviewed the layoff decisions to make sure there was not disparate treatment or impact or concerns with Family and Medical Leave Act (FMLA), Equal Employment Opportunity (EEO), Uniformed Services Employment and Reemployment Rights Act (USERRA) and workers' compensation. (Tr. 154.) He otherwise was not involved in the decisions about which production workers should be laid off, but noted that GRS' protocol is to look at performance quality, safety record, attendance, and whether they are cross-trained in other jobs. [23] He assumed Stewart and Maciel assessed these factors. (Tr. 495–499.)

In an email sent at 12:35 a.m. Saturday night/Sunday morning to Hudgens, Maciel, and Stewart (cc'd to Stuckey, Torra, and Maxey), Lave responded to the proposed layoffs, expressing concerns that there were too many employees in their 50s and 60s, and too many Hispanic and older repair people being terminated so he made suggestions to make it more balanced. (Tr. 182; GC Exhs. 11, 14, 16; R. Exh. 55.) Based on Lave's concerns, Stewart and Maciel made some changes. John Anderson, a writeup employee,[24] was retained because of Lave's recommendation. He noted that the AAR writeup employees Stewart and Maciel proposed to retain each had only 3 months' experience, while Anderson had at least 6 years, and the other employee proposed for layoff had 9 months of experience. Fonseca was retained as painter based on feedback from Lave that he was the only American Indian/Alaskan Native employee, he was 64 years old, and had been with GRS 5 years. Based on Lave's concerns that only Hispanic welders were targeted for layoffs, welders Ramon Parra and Eugenio Ruiz, who had been recommended for layoff, were instead retained. Welders Oswaldo Chavira and Brian Scaggs were recommended for retention but were instead laid off. (Tr. 1070–1077; R. Exh. 56).

E. The Layoffs

On November 12, employees were divided into two separate meetings: one for employees being laid off and another for employees being retained. Maxey had previously distributed talking points and a timeline to Hudgens and Maciel (with Lave cc'd) for meeting with the employees in Tucson. Maciel and Valdez met with the employees being retained, and Hudgens and Maxey met with the employees being terminated. (GC Exh. 42.)

Employees who were being retained met in the front of the facility. Maciel addressed the Spanish speaking employees and said that GRS was letting people go, but this group was going to stay. Silva recalled being told they were the best employees so they were chosen to stay, and they "were going to erase all the points and everybody was going to have to start a clean sheet like so everybody had zero." (Tr. 658.)

The 27 employees who were being let go on November 12 met with Hudgens and Maxey.[25] J. Martinez taped the meeting. (Tr. 1377–1378.) Vasquez provided Spanish translation. Hudgens let the employees know they were being let go because the shop had been losing a lot of money the last few months, and their efforts to bring people in and train them had failed, so they needed to take immediate, drastic action. Hudgens then said Maxey was there to answer any questions. When asked how employees were chosen, Maxey responded that it was a matter of restructuring the whole shop, and they considered productivity, performance, attendance, and profitability. Some of Maxey's comments were inaudible. Vasquez' translation stated:

> There were a lot of factors that influenced what has happened here and why this decision was taken. The people that are in this group here, in some cases, it was because they had an attendance record and in other cases, it was because of productivity. In other cases, it was the manner in which they just handled themselves in general or they performed in general. And in other cases, it was also that the people that are here are here as a support team.

Maxey informed them they would be paid for that shift that day along with any accrued PTO. Hudgens let them know that Morrison and Madrigal had been let go.

Between 21 and 23 minutes into the meeting, J. Martinez stated in Spanish, with an interpreter translating to English in the background:

> Last year, they brainwashed you guys all, promising you things that—things so that you wouldn't vote for the union, because they were defending the company in order to supposedly give them a second opportunity. But you can have this down for sure. That this Monday, there's going to be a petition for a union vote. They want to vote. Yes, they want to vote. And that's the petition for a vote. And I'm going to tell you this. And I'm telling you this, because I'm one of their leaders. It's that simple. So this Monday, we'll have—they're going to have a petition. So just, you know, to be prepared.

A couple of other employees referred to a union organizing campaign. An employee stated, "I wanted to vote for the union" and another said "I wanted to vote for the union last year." After a few other comments, the meeting ended with Maxey offering to answer any questions. (Tr. 1354–1375; GC Exhs. 199–200.)

R. Martinez and Juan Morales were not at work on November 12, so they were notified of their terminations on November 13.[26] (Tr. 1697–1698.) In total, 29 employees were laid off.

[23] Maxey recalled the factors as position, cross-training, attendance, safety record, and equipment they could operate. (Tr. 1624.)

[24] At the time of the hearing he was billing manager.

[25] These employees were Alex Amador, Jesus Fernando Barnes, David Bottinueu, Oswaldo Chavira, Karim Duqmaq, Hector Federico, Jaime Hernandez, Jesus Armando Lopez-Nuno, Jorge Martinez, Jesus Martinez, Ricardo Martinez, Karl Mason, Chad Morshback, Guillermo Murguia, Jose Angel Ortega, Carlos Contreras Ortiz, Gabriel Ortiz, Brian Perona, Guillermo Gonzalez Pico, Jesus Omar Ramos, Jeff Raske, Jesus Ruiz, Oscar Salinas, Brian Scaggs, Jose Manuel Sepulveda, Frank Soto, and Martin Valdez.

[26] Juan Morales is listed in the complaint as being laid off on November 12, but the evidence shows it was November 13.

Employees were terminated with no expectation or promise of recall. (Tr. 155–156; GC Exhs. 199–200.) Among the employees retained were three from a temp agency, each of whom had been working at the Tucson shop for less than 2 months. (GC Exh. 139–141; Tr. 909–912.) Jaime Hernandez, who was "one of the strongest" employees and had received a raise approved by Maxey on September 8, was laid off.

Morrison was removed as plant manager as of November 12, and Juan Maciel was named interim plant manager. (R. Exh. 66.)

At the time of the layoffs employees were working mandatory overtime on a weekly basis. About half employees were working overtime about 10 to 13 hours per week, Mondays through Thursdays and Saturdays. (Tr. 398, 454–455.)

F. Attendance Audit

On November 12–14, Maxey spent time reviewing employee attendance because prior to the layoff, individual employees had told her about errors. (Tr. 483, Tr. 1632–1633.) The concern was that Madrigal had not been keeping proper records, and some people were assessed attendance points that were unwarranted, while others were not assessed points when they should have been. Maxey and Maciel raised the idea of rolling back attendance points with Lave. He agreed it did not seem fair to go forward with bad data, and thought it also would give employees a morale boost. (Tr. 481–488; GC Exh. 40.) Torra approved the rollback on November 15, and it was announced to employees that same day. (Tr. 488; GC Exh. 41.) Maxey (with Maciel translating) told employees they had found some errors with the points, and to ensure fairness to all employees, they were rolling back the points, but the same attendance policy was still in place. (Maxey 1629–1631.)

G. The Petition and Request for Recognition

Murguia informed the Union about the layoffs on November 12, and five or six employees met with the Union at its Phoenix office on November 13. (Tr. 1828.) The Union filed a petition for election on November 14 and submitted 51 signed authorization cards. (GC Exh. 1(c); Tr. 1831.)

On November 20, Sudyam and Holly went to Greenbrier's Tucson facility and asked to speak to Valdez. The receptionist told them that any communications needed to be directed to Lave. (Tr. 1833.) That same day, the Union sent, via certified mail, a document entitled, "Recognition Agreement" to Lave. The recognitoin agreement states that the Union has submitted and the employer is satisfied that it represents a majority of its employees in an appropriate unit. It further sets forth agreements pertaining to representation and collective bargaining. (GC Exh. 251, 259, 260; Tr. 1951–1952.) No cover letter was sent with the recognition agreement. (Tr. 2609.) The Union did not follow up with Lave and did not send him cards or a list of employees who had signed cards, nor did Lave follow up with the Union. (Tr. 1975–1976, 2610.)

Maxey claimed she did not know about the union organizing drive until the petition was served in November 2012, and that she never saw anyone sign cards or any other indicia of union support from employees. (Tr. 1561.) Lave said he did not know about the organizing drive until the petition was served on November 15. (Tr. 2608.)

H. Pay Raise and Bonus

Hourly employees who are at the top of GRS' pay scale for their positions are considered to be "capped" and are subject to annual pay increases. GRS historically determined what the increases would be in November or December, and they were paid retroactive to September 1, the beginning of the fiscal year. (Tr. 2617–2621.)

On November 27, 2012, Stuckey announced that for employees who were at the top of their pay range, hourly pay increases would take place on January 1 instead of the usual date, September 1. To facilitate the change, eligible employees received a one-time lump sum of $350. (R. Exhs. 90–92.)

The Bill Furman year-end bonus, also referred to as the CEO bonus, was paid in mid-December 2012 to all employees in the corporation. Lave heard about it from Walt Hannon, the senior VP of and chief human resources officer for Greenbrier Companies, Inc. The employees who were working on the December 14 payout day received the bonus. (Tr. 500–502.) How much an employee received depended on years of service to Greenbrier. Other subsidiaries did a flat-rate bonus. (GC Exh. 43, Tr. 505–506; R. Exh. 88.)

I. Rehiring Employees and Continued Recovery Planning

On December 10, Abel sent an email to Torra, Lave, and Bernie Ferguson, vice president of sales and marketing, stating that Furman had requested a case history of Tucson that culminated in its current dire situation. Torra responded on December 16, recounting a plant manager passing away in 2009, a large layoff in 2009, loss of employees due to INS issues in 2011, the union vote in 2011, and a couple other personnel changes. (R. Exh. 271.)

In early 2013, GRS management decided to start bringing back some of the employees it that had been laid off. Torra wanted to see a 15–20-percent increase in labor efficiency before bringing back employees. Torra gave approval to start rehiring employees in February 2013. He based this decision on improved efficiencies in the work force. (Tr. 234, 333–339.) In December 2012, the labor utilization rate in Tucson was 55 percent, in January 2013 it was 46 percent. By Stewart's account, he had the discretion to determine when labor utilization rates were under control, and he decided to start rehiring employees in Tucson because the labor utilization rates had hit the desired target. Stewart considered a labor utilization rate of between 60 to 80 percent as being under control; rates of 46 and 56 percent were not considered under control. (Tr. 1268, 1278–1279)

To meet profit goals, they decided to they needed to increase headcount to about 70–90 employees. To ensure training was done properly and to minimize stress on management and support staff, the re-hiring was to be done gradually, around four employees per month. (Tr. 1086, 1267–1269, 1274.) They were going to rehire some welder repairmen based on skillset and the ability to return to work without needing any training. Maciel wanted candidates who had passed a welding test and

had previous railcar repair and welding experience. (Tr. 1556–1559.)

To select who should be rehired, Stewart said Maciel talked to Valdez and Dover, and came up with the employees he thought had the skillset they needed. (Tr. 1270.) Maciel said he determined who to rehire with input from Valdez. (Tr. 1087–1088, 2380.) Valdez said he was not consulted about whom to rehire. (Tr. 1975–1996.)

There was no written rehiring process and the former employees seeking to be rehired were considered to be the same as new hires. They were required fill out a new job application and return it to C. Martinez. She would then set up an interview with the plant manager. (GC Exh. 206.) C. Martinez said she gave the former employees about a week to get back to her with a completed application. (Tr. 2796.) Maciel was not sure whether all re-hires submitted a new application. He did not see or review the applications. (Tr. 2380.)

Maxey reviewed all rehire decisions and looked at the former employees' applications and separation information, but HR did not review performance records or evaluations. (Tr. 581–582, 1550–1553.) Maxey and Lave told C. Martinez to keep a log of which former employees she called, their response, and if there was anything unusual about her interactions with the former employees. Maxey reviewed the log about once a week.[27] (Tr. 1667–1670.) Maxey looked for how the former employees interviewed, whether they filled out their applications completely, and whether they had questions or concerns about going back to work. She screened for employees who had negative attitudes or a chip on their shoulder about coming back to work. (Tr. 1576–1577, 1684–1686; GC Exh. 206, p. 11.)

Lave reviewed all candidates with felony convictions prior to GRS offering them a position. These employees filled out the regular application along with a supplemental application that addressed the details of their felony convictions. (Tr. 552.)

On January 23, Stewart sent Lave an email asking whether he had made progress on the first four employees set to be recalled. Lave responded that Torra would be discussing it with Stewart and Maciel. (GC Exh. 44.) On January 25, 2013, Lave reviewed the names of four employees for potential recall to see if they would present any issues. (GC Exh. 45; Tr. 517.)

On Friday February 1, Maciel gave C. Martinez a list of five laid-off employees he was considering for re-hire: Martin Valdez (M. Valdez), Jaime Hernandez, Carlos Contreras Ortiz (C. Ortiz), Gabriel Ortiz (G. Ortiz), and Oswaldo Chavira. (GC 67.) She called them all that same day. She scheduled interviews for C. Ortiz and Chavira for February 4, Hernandez and G. Ortiz for February 5, and M. Valdez for February 6.

C. Ortiz was the first interview on February 4. He came in, completed an application, and interviewed with Maciel. He was offered a job as a welder repairman, and accepted effective February 5. (GC Exh. 67; R. Exh. 57.)

Later that day, Chavira came and went straight to Maciel's office. Maciel sent him back up front to complete the application. He entered in a hurry, said he did not have time to fill out the application, and asked if he could take it with him. He said he had a new job and wanted to see if he liked it before deciding whether to return to GRS. He was "short" when speaking with them, and C. Martinez noted, "Juan not impressed with his tone." He asked if he could bring the application back in a couple of weeks. C. Martinez said that was fine but there was no guarantee the job would still be open. (GC Exh. 67.) Maciel recalled Chavira stating that had another job and needed about 30 days to consider whether or not he wanted to come back. Maciel instructed him to take an application if he was interested, but recalled that he never did. (Tr. 2390.) After Chavira left, C. Martinez spoke with Maciel, who told her Valdez knew of another candidate they could call, Hector Federico. She called Federico and scheduled him to come in on February 6. (GC Exh. 67.)

Hernandez and G. Ortiz each came in on February 5, filled out applications, and interviewed with Maciel. They both were offered and accepted jobs as welder repairmen effective February 6. (R. Exhs. 58–59; GC Exh. 67.) M. Valdez and Federico went through the same motions on February 6, and were offered and accepted jobs. Federico was earning $11 per hour as general labor prior to the layoff but was brought back as switchman at $13.74 per hour effective February 11. He had not worked as a switchman before but he received on-the-job training when he was rehired. (GC Exhs. 67, 72; R. Exh. 61; Tr. 618.) M. Valdez, who had a felony conviction on his record, was hired as a welder repairman effective February 11.[28] (Tr. 1575; GC 206 p. 8; R. Exh. 60.) C. Martinez made a note on February 6 that Chavira told him he would let her know on February 8 whether or not he was interested in returning to his job. (GC Exh. 67.)

On February 7, Juan Morales, who was a painter at the time of his layoff, submitted an unsolicited application.

On February 14, Stewart and Maciel told Lave they needed to increase the headcount from 57 to 65 over the next 45 days. Work had increased, there was a backlog, and production employees were working overtime. (GC 46; Tr. 1095; 1554–1555.)

On February 19, Chavira called C. Martinez to let her know he had dropped off his application on the 15th. She told him she would get back to him after speaking with Maciel. C. Martinez obtained Chavira's phone number and emailed Maciel to let him know about Chavira's interest. Maciel did not recall following up with Chavira. (GC Exh. 67; Tr. 2400–2401.) According to Lave's notes, Chavira dropped off an application on February 15, called to follow up on February 19, and came by the office on April 24 to inquire about employment. He was not rehired due to bad interview attitude, refusal to complete application, and delay in eventually completing application. (GC Exh. 63.)

Also on February 19, Ricardo Martinez (Ricardo M.) submitted an unsolicited application. C. Martinez' notes describe Ricardo M. as a painter, but GRS records show him as a general laborer at the time of the layoffs. (GC Exhs. 63, 67.)

[27] A similar log was not maintained for new hires. C. Martinez generally made the entries but sometimes would cut and paste from emails. (Tr. 2770–2771.)

[28] Lave was involved in the decision on whether Valdez would be offered a position because of his felony conviction. (Tr. 553.)

Welder Brian Scaggs submitted an unsolicited application on February 21. (GC Exh. 67.)

On March 1, C. Martinez sent Maxey quotes to run employment ads. (GC Exh. 219.) On March 4, Maxey told Stewart and Maciel she had placed an ad on Craigslist and One Start, the local unemployment office, for a maintenance mechanic. (Tr. 1635–1636.) Stewart suggested they may have better luck if they targeted better communities.

Valenzuela started as the new plant manager on March 4, 2013. Stewart informed Valenzuela about the layoff and told him the union claimed it was due to the organizing. (Tr. 1123–1224.) Valenzuela oversaw the rehire process from this point forward, and Maciel's involvement was minimal. (Tr. 2390.) According to Valenzuela, he would tell Maxey the number of employees they needed for the month and she would send him a list of names. Valenzuela initially testified he did not review files during the rehire process, but asked C. Martinez to see if there were problems such as missing work. (Tr. 1204.) He later testified that he looked at employees' files prior to hiring them to see if they had safety or attendance issues. (Tr. 2111.)

On March 6, Maxey sent C. Martinez a list of five employees GRS would like to bring back from layoff. She instructed her to, as with the others, "keep very detailed notes of your interactions with them." When C. Martinez responded, she asked if she should sit with the employees as they fill out applications, and Maxey responded that she should sit with them first and then ask Valenzuela how he wanted to proceed with interviews. (GC Exh. 206, p. 12.) C. Martinez' log for March 7 states she received a list of the following employees: Antonio Acuna, Jesus Lopez Nuno, Jose Sepulveda, Joes Ortega, and Jesus Barnes. She called them that same morning, was unable to reach Acuna and Ortega, and left a voicemail for Nuno. Sepulveda and Barnes agreed to come in on March 8. Nuno came into the office on March 8 and asked if he could take an application home so that his brother could help him read and complete it. Sepulveda and Barnes completed applications, interviewed with Valenzuela, and accepted positions as welder repairmen. (GC Exh. 67; R. Exhs. 10–13.)

Acuna called Foreman Hector Barajas on March 8 and 9, and told him he was interested in coming back. C. Martinez told Barajas to have Acuna call her and come fill out an application. She talked to Maxey about accommodating Acuna's schedule as much as possible because he was working out at the mines. (GC Exh. 67.)

Nuno returned his application on March 11, spoke with Valenzuela, and accepted a job as a welder's helper. (R Exhs. 14–15.) Acuna came to the office on March 11, filled out an application, spoke with Valenzuela, and accepted a position as a welder repairman. (R. Exhs. 16–17.) C. Martinez emailed Maxey to let her know that Acuna had asked about position and pay, since he had been a lead prior to the layoffs. She mentioned that Acuna knew they were only hiring welders, not leadmen. (GC Exh. 206, p. 17.)

On March 13, C. Martinez sent Almazan at Intermountain a position description for a mechanic position they were trying to fill. (GC Exh. 143.) On March 14, Almazan inquired as to whether Greenbrier had an interest in hiring Michael Downing, who was laid off from an industrial maintenance position at another company, and he was hired March 25. (GC Exh. 145.) Also on March 14, C. Martinez asked Almazan if they could set up an interview with Adolph Martinez, a certified welder with industrial maintenance experience who had applied through Intermountain. (GC Exh. 144.)

Murguia called Valenzuela on March 14, stating that he has heard people were being hired back, and he wanted to return to work.[29] (Tr. 805–806.) Valenzuela recalled that Murguia came to his office later that same day and asked for his job back. Valenzuela told him he should fill out an application and they next time they were ready to hire they would probably call him. Valenzuela also recalled Murguia looked upset and said the reason was that they had hired back Lopez-Nuno as a helper even though he had more experience. Valenzuela explained that they hired based on the needs of the plant and the workers' skills. He left without submitting an application. (Tr. 2127–2128; R. Exh. 28.) C. Martinez made notes about Valenzuela's conversation with Murguia, stating that Valenzuela said Murguia was very aggressive and noting, "Eric tried to address his concerns and explain how the process was working but Guillermo didn't want to hear it." (GC Exh. 67.)

On March 14, Oscar Salinas came to C. Martinez' office, "hands on his hips" and said he heard they were "calling everyone back to work" and wanted to know why he had not received a phone call. C. Martinez told him he could fill out an application and go through the process. She perceived him as arrogant and noted that he voiced displeasure about having to fill out a new application since he had already worked for GRS. He picked up an application but did not complete and return it.

Salinas brought back his application on March 15, but it was not complete. C. Martinez showed him what he needed to do, and he agreed to bring back the completed application the following Monday, March 18. She noted he presented himself in a much calmer manner, and was pleasant and polite. (GC Exh. 67.)

Ortega's wife came to the office on March 18 to get a letter documenting the status of her husband's employment. C. Martinez gave her the letter. (R. Exh. 100.) She also gave her a business card with the Company's phone number and told Mrs. Ortega that they had been trying to get in touch with her husband to potentially return to work, but they did not have a working phone number for him. C. Martinez did not recall receiving a completed application for Ortega. (GC Exh. 67; Tr. 2775.)

On March 18, Valdez sent Maxey an email telling her that Murguia had come to the front shop the week of January 21, and had an attitude, stating that he had the right to go into the front shop and hang out with his ex-coworkers. Maxey passed this information to Lave. (GC 206, p. 19.)

On March 19, C. Martinez was told to contact Brian Perona and Jorge Martinez (J. Martinez) to go through the rehire process. J. Martinez agreed to come in the following day. C. Martinez left a message for Perona. (GC Exh. 67.)

[29] C. Martinez' log entry about this conversation is March 14, and she sent an email on March 15 stating the conversation occurred yesterday. (GC Exhs. 67, 206, p. 18.) Valenzuela's March 18 email states it was March 12, and Murguia could not recall the exact date.

C. Martinez's log states that Salinas returned his application on March 20. (GC Exh. 67.) She testified that she gave him back the application because it was not complete and he never returned it. (Tr. 2779.) J. Martinez turned in his application, met with Valenzuela, and was offered and accepted a job as a welder repairman effective March 25. (R. Exhs. 18–19.) C. Martinez left another message for Perona. He called her back the next day, March 21, and said he was interested in returning, but wanted to know if he would be re-hired at the same pay and with his original hire date. She told him Valenzuela would be able to answer these and other questions he posed. He came in later that afternoon, completed the application, and met with Valenzuela. Perona was rehired as a welder repairman on April 1. (R. Exh. 21.)

On March 22, C. Martinez attempted to call Omar Ramos, but the number she called was not in service. She called Brain Scaggs and Juan Morales, both of whom agreed to come in on March 26. She left voice messages for R. Martinez.

Morales, who had worked for GRS as a painter, had previously submitted an unsolicited application on February 7. He was re-hired on April 1 as a welder repairman. His previous wage with GRS had been $13.01, and his new wage was $14 per hour. (R. Exhs. 22–23.) Scaggs, who had submitted an unsolicited application on February 21, was hired as a welder repairman on April 1. (R. Exhs. 24–25.)

Ramos came to C. Martinez' office on March 25, stating that Freddy Valdez told him he had his job back. She explained there was an opportunity, and he needed to fill out an application and interview with Valenzuela. He started filling out the application but omitted certain information. When C. Martinez told him he needed to complete the whole application, he said that he thought GRS had to hire back the laid-off employees before they hired anyone else. She told him he could take the application home and return it later. He became angry, took the application, and left. C. Martinez noted that he returned in the afternoon with his application. (GC Exh. 67.) Ramos recalled filling out the application on the spot. (Tr. 1758.)

Ramos interviewed with Valenzuela, who said he was calm and the interview went without incident. (Tr. 2135.) Ramos recorded the interview. Valenzuela stated that he knew people felt the layoff was because of the Union. He stated that the reason for the layoff was that the company was losing money, and the Union "may or may not have had anything to do" with it. He said that people talking about it, wasting time, and thinking about it made things worse. Valenzuela mentioned that the Company had been losing money the last two years and the Tucson shop was going to be closed down, but they came up with a plan to turn things around by downsizing. He also mentioned that they brought him in to bring the plant back to where they were before. He noted that a lot of people were worried that GRS was bringing back people who were strong Union supporters but he didn't care. (GC Exh. 236.) Valenzuela testified that Ramos brought up the Union during the interview and stated that he supported the Union and thought they could fix some problems. This was conveyed to Maxey, Stewart, and Maciel in an email. Specifically, with regard to the Union, email stated:

> He went on to telling (sic) me that he was an active member of the group trying to form a union. He said he didn't believe that a union was necessary under normal circumstances, but that things were so bad that he didn't see any other option because of the following issues: He said the uniform money was being discounted from his paycheck week by week even though he didn't have uniforms and nobody did anything about it. His paycheck was shorted quite often and Margaret and Lex would do nothing to fix it. Last he said he didn't feel comfortable because people in authority positions had favorites and if the rest of the employees were not in the good side of such authority people, they were doomed to low pay increases, worst jobs, and even unemployment.

(Tr. 2136–2137; R. Exh. 30.) Ramos was not hired back, as discussed more fully below.

R. Martinez came in and completed an application on March 25, and interviewed with Valenzuela. He was offered a job as a welder repairman, and was rehired as of April 16, pending 2 weeks' notice to his current employer. (R. Exhs. 26–27.)

On March 25, Murguia showed up to talk to Valenzuela, but he had not completed an application. Valenzuela stated that he was very humble and begged for his job back. (R. Exh. 29; Tr. 2130.)

During a conference call on March 27, Maxey informed Valenzuela and C. Martinez that a decision had been made not to bring back Ramos. Based on his behavior when he came to re-apply and his history, they felt it was best not to bring back a disruptive employee. (GC Exh. 67.)

On March 29, Valenzuela sent Maxey an email stating that Murguia had called him on March 28 to check on job openings. He told Maxey that Murguia was aware they were hiring people from the outside, so he wanted to make sure they didn't forget about him. Valenzeula told Murguia he would keep him in mind. (GC Exh. 206, p. 20.)

Murguia continued to call and ask to be rehired. C. Martinez' log states that Murguia came to the shop on April 9 and demanded to see Stewart. J. Vasquez and C. Martinez went to talk to him and explain the situation. C. Martinez introduced herself and explained that he was welcome to take an application, but he could not just stay in the office. (GC Exh. 67.) C. Martinez recalled he took an application, and thought submitted it to the plant manager.[30] (Tr. 2781, 2784.) Murguia, however, said he did not complete an application. (Tr. 809.)

Alcides Valencia, who was working as a temporary employee through Intermountain at the time of the layoffs, was hired as a GRS employee on April 15. (GC Exhs.142, 147.)

On April 9–11, 2013, there was an executive planning meeting where one of the topics discussed was the San Antonio facility, which was slated for closure in September or December 2013. They also discussed the recovery plan for Tucson. The strategy was to consolidate the work force to TTX and raise rates. (Tr. 522–524, 2449; GC Exh. 49.)

An April 24 draft of GRS' recovery plan notes that labor efficiency in Tucson improved from 60 percent in December to 93 percent in February. The plan was to increase headcount to

[30] She did not see him engaged in any aggressive behavior. (Tr. 2800.)

75, close the truck shop, and continue training. It also notes, "Now process Stabilized, recalling most of direct employees furloughed."[31] The plan also called for closure of the San Antonio facility by the end of September. (GC Exh. 162, 166.)

On May 9, Ortega came to the shop unsolicited and spoke with "Juan,"[32] who encouraged him to apply for a job. (GC Exhs. 63, 67.)

On May 15, Salinas came to the shop to inquire about employment and C. Martinez said all positions had been filled. Salinas asked to see Valenzuela, but C. Martinez conveyed that he was busy. C. Martinez took his name and number and, when he continued to hang around, he was instructed to leave. (GC Exhs. 63, 67.)

As of May 2013, there were still four positions that needed to be filled to meet target headcounts for direct labor. (Tr. 1693.) After May, roughly five new employees were hired from the outside. (Tr. 2798–2799; GC Exh. 63.)

Lave maintained a list of employees called for rehire, delineated by: name on charge, name on payroll, layoff date, title at RIF, rehire date, title at rehire, and comments. Carlos Ortiz was rehired into his previous welder repairmen position on February 5, 2013. Other welder repairmen hired back to the same position were Jaime Hernandez and Gabriel Ortiz on February 6, Jesus Barnes on March 12, Brian Scaggs and Brian Perona on April 1, and Rogelio Martinez on April 16. Martine Valdez, Manuel Sepulveda, and Jorje Martinez were airmen at the time of the layoff and were rehired as welder repairmen. Valdez was rehired on February 11, Sepulveda on March 12, and Martinez on March 25. Jesus Lopez-Nuno was a switchman when he was laid off and was rehired as a laborer repairman on March 13. Antonio Acuna, a leadman when laid off, was rehired as a welder repairman on March 18. Lave's list states Morales was hired back into his previous position as a painter on April 1, however the hiring documentation states he was hired back as a welder repairman. (GC Exh. 63; R. Exh. 23.) Hector Federico, a general laborer at the time he was laid off, was rehired as a switchman on February 11. (GC Exhs. 63, 72; Tr. 595.)

Murguia was not re-hired. According to Maxey, this was because he failed to follow the rehire process by not submitting an application. He was also "obstinate, belligerent with staff" on several occasions. In addition, he frequently showed up without invite and went to areas where he should not have been. Maxey learned Murguia was belligerent from Valenzuela, who said he was using a loud voice and being very aggressive. (Tr. 1641–1642.) Maxey had asked C. Martinez and Valenzuela to email their interactions with Murguia so she would have a record.[33] (Maxey Tr. 1678.)

Valenzuela recommended bringing Ramos back, but he was not rehired.[34] (Tr. 2136–2139; R Exh. 30.) According to Lave, this was based on his conduct when he came to apply. (Tr. 520, 555.) Maxey also recalled that he had a history of being argumentative with Madrigal, in particular regarding attendance points, but said the focus in deciding not to rehire him was on his most recent behavior. (Tr. 1647–1648.) Valenzuela testified that he later found out that Ramos had "a lot of conflict with employees and supervisors" and the way he treated C. Martinez let him know he was probably "very confrontation and conflict prone."[35] (Tr. 2140.)

Ramos' most recent performance appraisal shows he received a 3–excels, the highest score, on "mutual respect," and the comments were, "He gets along and respects everyone." For "Teamwork and Cooperation" Ramos received a 3, and the comments stated, "He works good with and around others and pulls out his part of this work as asked upon." He also received 3's in "Responsibility and Initiative," "Job Knowledge," "Quality of Work," with some positive comments about his job performance. He received the highest rating for "Productivity." He received a 2–meets requirements for "Safety," "Attendance," and "Customer Focus," with a comment that he needed to improve attendance. Under "Strengths" Ramos' supervisor commented, "Puts out quality work and never says no to anything asked of him." There were no opportunities for development listed. At the end, in the comments section, the appraisal states, "Omar is a very good and hard worker!" Ramos received a total score of 28, and the appraisal was signed in late September 2012, by Ramos, his leadman Valdez, and Maxey. (GC Exh. 208.)

Another welder who was recalled to work, Jesus Barnes, received a total score of 20 on his most recent performance appraisal in June 2012. Barnes received a score of 3–excels in "Safety", with the comments that he follows procedures and helps others in aspects of safety. He received scores of 2–meets requirements, for "Mutual Respect," "Attendance," "Responsibility and Initiative," "Job Knowledge," "Customer Focus," and "Quality of Work," with comments that he has much room to improve job knowledge, and the quality of his work meets standards, but his job knowledge affects work quality. He received either a 2 or 1–needs improvement on "Productivity" with the comment, "Would like to see work output in a more timely manner." He received a score of 1–needs improvement, in teamwork, with the comment that he had trouble working with another employee due to a small conflict and he needed to separate personal emotions from job responsibilities. "Strengths" were noted as a strong will to learn and good attendance. For "Opportunities for Development," Barnes' supervisor stated, "has a lot more procedures to learn, needs to learn work order." The supervisor also noted additional opportunities for development were learning MIs (maintenance in-

[31] Torra believed they attempted to rehire all production employees. (Tr. 334.) He also testified that at this point, GRS planned to approach TTX with a new billing structure and convert San Antonio and Tucson to 100 percent TTX facilities. (Tr. 2452.)

[32] This likely refers to Maciel, the former acting plant manager.

[33] Lave also had input into the decision not to rehire Murguia. (Tr. 556.)

[34] Valenzuela recalled that Ramos and Murguia were the only individuals he interviewed but did not hire. (Tr. 1197.)

[35] Valenzuela testified that he, Maxey, and Stewart decided not to rehire Ramos, but this does not appear to be the case, as C. Martinez' log entry states that Maxey conveyed to Valenzuela "corporate's" decision not to rehire him. (GC Exh. 67.)

structions) and work orders. (GC Exh. 220; Tr. 1659.) Carlos Contreras had a score of 24 and was the first employee called back as a welder repairman. Brian Perona was also rehired as a welder repairman with a total score of 27.[36] (GC Exhs. 223–224.)

Alex Amador, a painter, was not contacted or considered for rehire. Lave's notes indicate Morales was hired back as a painter instead. (GC Exh. 63.) Other employees who had been laid off on November 12 also were not contacted.

Foreman Fonseca, materials manager Keith Tarpley, and Martin Valdez, told C. Martinez they were surprised GRS was bringing back strong union supporters. (Tr. 2786–2789.)

J. April 23 Handbilling

On April 23, 2013, at around 4:40 a.m. SMW representatives Sudyam and Molina handed out canvas lunch sacks with the union insignia to employees as they drove to work. Inside each sack were a SMW mug and a flyer. (Tr. 2145; 1840–1841, 1904.)

Valenzuela went outside to where the union representatives were after John Hardenbrook, materials supervisor, told him there were people out at the entrance to the facility and he almost ran them over. (Tr. 1171.) Valenzuela and Valdez drove out to the entrance and Valenzuela asked them to leave the property.[37] Sudyam and Molina identified themselves as being with the Union and said they were doing their job and were not going to leave. Valenzuela observed them handing out flyers and speaking with employees. According to Sudyam, Valenzuela and Valdez walked with Sudyam and Molina as they approached cars to hand literature to employees. (Tr. 1844.) Valenzuela called the police and told them the union agents were causing traffic and creating a very dangerous situation. (Tr. 2151.) Valenzuela was out at the entrance for approximately 7–8 minutes. When Vasquez arrived for work, he told Sudyam and Molina that it was unsafe to be handing out materials in the dark, and by law they needed to wear vests. He remained in the area about 15 minutes. (Tr. 1879, 2075–2076.) Sudyam and Molina moved their cars across the street and came back to hand out flyers. At this point, Valenzuela went back to his office. (Tr. 1176–1177.)

Valenzuela called Stewart and Lave and then sent an email to Lave and Maxey at 6:31 a.m. telling them what had occurred. Lave told Valenzuela that if the union agents returned, they were legally entitled to be there if they remained out at the sidewalk along the street and off GRS' property. If they were backing up traffic, it was in Valenzuela's discretion to call the police. Lave instructed Valenzuela to keep things cordial and nonconfrontational. (Tr. 582–586, 1178–1179.)

Valenzuela said he had been unaware of the SMW organizing efforts prior to this. (Tr. 1122–1123.) After April 23, the Union continued to handbill on future occasions without incident. (Tr. 1846.) Federico handed out union flyers with the union agents a couple times a week over a couple months. (Tr. 655–656.) Valenzuela would send Lave any flyers he saw when union representatives came to the facility. (Tr. 1135–1137.)

On May 15, Torra, Stuckey, Glenn, and Ferguson attended a meeting with executives from TTX in Lombard, Illinois. Present for TTX were vice president of equipment, Sharon Harmsworth, assistant vice president of operations, John Cutrone, and assistant vice president of supply chain, Adam Lent. (Tr. 2453; R. Exh. 67.) According to Ferguson, one purpose of the meeting was to help GRS understand what TTX needed in terms of capacity, as the volume of work was down in both San Antonio and Tucson. The GRS executives were concerned that both shops were performing poorly and giving bad customer service. TTX had suggested they visit their Acorn repair facility in Jacksonville, Florida. They visited the facility and said they could give them a proposal that would make Tucson and San Antonio look like Acorn. (Tr. 2509–2512.) Harmsworth recalled GRS conveying that due to the pressures they were facing from Wall Street with Carl Icahn trying to take over the Company, they were looking at each facility to determine whether to close, fix, or sell it.[38] (Tr. 2655–2656.)

K. Employee Survey

In May 2013, Valenzuela, C. Martinez and Vasquez prepared an employee sarisfaction survey. Valenzuela said he wanted to let the employees know the Company cared about them and to find out if there were any issues that needed to be addressed.[39] Groups of employees were called together in a room to complete the survey. Valenzuela instructed the first group that he was new and wanted to make changes and have a good work environment. He told employees they could fill out the surveys anonymously. The survey was six pages long and asked employees multiple choice questions about their satisfaction in four general categories: job satisfaction, supervisor's performance, safety, and administrative satisfaction. The survey then allowed employees to comment on the best and worst things about working for the Company, and to suggest how the GRS could enhance their satisfaction. Valenzuela summarized the results and provided a report to Stewart, Maxey, Maciel, and Lave. (R. Exhs. 31–33; Tr. 666, 2167–2174.)

[36] Brian Scaggs who worked in writeup, received a score of 18 on his appraisal, which he signed on October 2, 2013, and Valdez signed on August 20, 2012. (GC 225.) He was moved back to a welding position because he did not do very well in writeup. (Tr. 1664.)

[37] Sudyam described him as aggressive, stating he was yelling and cursing. (Tr. 1842.) Valenzuela denied using profanity and recalled they were speaking Spanish. (Tr. 2149.)

[38] The record, in various places, refers to an attempt to take over Greenbrier and attendant subsequent pressure from Wall Street for Greenbrier to perform well. I take official notice of the well-publicized attempted hostile takeover of Greenbrier in late 2012 by billionaire investor Carl Icahn, who controls American Railcar Industries Inc. See, e.g., http://www.bloomberg.com/news/2012-12-21/icahn-target-greenbrier-falls-as-investors-doubt-deal.html; http://www.oregonlive.com/business/index.ssf/2012/12/carl_icahn_makes_bid_to_purhca.html. Lave referred to this takeover in his June 28 speech to employees, discussed below, though Icahn's name was inaudible in English, and the Spanish translation of "Carl Icahn" was "Caroline." (GC Exhs. 151, 153.)

[39] Silva testified it was probably March, but also said he was uncertain about the dates. (Tr. 665–666.)

Employees at the Tucson shop had not previously been given a written satisfaction survey, and Valenzuela had never conducted such a survey.[40] (Tr. 51, 113, 2166.)

L. Safety Program

Employees were required to attend safety meetings each Monday morning at the beginning of the shift, and the Tucson shop had a safety committee that met monthly. (Tr. 1971–1974.) GRS also had a monthly gain share program in its wheel shops where safety was one component in the gain share payout. (Tr. 550.)

The Union filed a complaint with the Industrial Commission of Arizona on February 8, 2013, setting forth various alleged safety violations. (GC Exh. 261.)

In May 2013, the Respondent implemented Operation Safety 2013 to address Tucson's relatively poor safety record. (GC Exh. 61; Tr. 1976–1977.) Torra had asked Valenzuela to fix the safety situation because Tucson had the highest incident rate in the country. Vasquez was concerned that the number of small safety incidents was a harbinger of a larger catastrophic incident, so he and Valenzuela met to address these concerns. (Tr. 1996–1997; 2157.) On May 13, Valenzuela sent employees a 2013 safety action plan. It made some changes to the format of the Monday safety meetings and set forth specific training and hazard prioritization. It also announced a safety incentive program, starting with "poker for safety." (R. Exh. 7.) Each employee, over a 5-week period, would receive a card each week he worked safely. At the end of the 5 weeks, whoever had the best hand won. Employees could win boot vouchers, coupons, tools, days off, ipods, etc. The safety poker was played twice, for a total of 10 weeks. There were fewer safety incidents after the program was implemented. (Tr. 602–603, 626, 2003–2006.)

M. Notice of Representation Petition

On May 28, Valenzuela received the Notice of Representation Hearing petition. He notified Lave the following day. Aslo on May 28, Union agents distributed flyers at the Tucson facility. (GC Exh. 74; Tr. 1183.)

N. Juan Silva's Termination

An EOCC unit is a cushion at the end of a car to help absorb the impact of the connection of a locomotive to a car. Under the standard operating procedures for lowering an EOCC unit, the first step is to determine whether the unit has a thread on or a flange retainer. The next step is to drain nitrogen cylinders which can be charged with up to 600 pounds of pressure. After this is completed, the unit is compressed and the shaft at the end is marked. If the unit has a thread on retainer, the employee next must strap it, which entails applying a flat bar from the casting on the end of the EOCC to the tip of the shaft. (Tr. 2020–2027; R. Exh. 2.) Lowering an EOCC unit is a two-person procedure, with one person directing and another on the forklift.

Vasquez conducted training on operating the EOCC unit on October 8, 2012 and February 4, 2013, March 18, 2013, and April 1, 2013. (R. Exh. 1; Tr. 2028–2034). On May 29, in response to an incident involving employee Jorge Maldonado, training was conducted to reiterate safety procedures for discharging an EOCC unit. The trainings were all done in English.

According to Vasquez, right after the last meeting, Silva stayed behind and expressed his disagreement with the procedures. Specifically, he wanted to know why they weren't strapping the EOCC when it was being brought back up to the unit because he believed the same risk was involved as when it was being lowered. Vasquez explained the reasons to him and reiterated that regardless of whether or not he agreed with the reasons, the instructions were to be followed. He believed Silva understood. (R. Exh. 6; Tr. 2036–2039, 2083.)

Maldonado received a written warning on May 30, 2013, for failing to properly discharge an EOCC unit on May 29, with the notation that he had received training on the proper procedure on October 8, March 18, and April 1. The warning stated that Vasquez and Valenzuela saw him failing to discharge an EOCC unit, and that this could lead to imminent danger to life and health. The warning cautioned that further occurrences could lead to further discipline, up to and including termination. (GC Exh. 159.)

On May 30, at around 9 a.m., Silva and Scaggs were lowering an EOCC unit. (Tr. 677–682.) Scaggs had left a running forklift unattended while he discharged nitrogen from the EOCC unit, so Silva got on it because it was unsafe to leave it running unattended. He asked if Scaggs needed help and Scaggs told him to lower the unit. Assuming Scaggs had secured the strap, Silva lowered the unit.[41] (Tr. 684–685, 853, 860.) Leadman Ishmael Lopez asked if Silva lowered the unit and he replied that he had. After Lopez left, Vasquez asked Silva if he had put the strap on the unit, and Silva replied that he had not. (Tr. 854–855, 2043.) Silva was called in to meet with supervisor and HR around noon, and was told he was being terminated. (Tr. 677–689; GC 125.)

Vasquez said Maldonado was disciplined less harshly because he just missed the strapping whereas Silva disregarded the entire procedure. (Tr. 2045.) Vasquez did not know whether or not the unit Maldonado lowered was discharged. Scaggs received a 3-day suspension for working on an EOCC unit that he did not strap or discharge. (GC Exh. 129.) Vasquez did not talk to Scaggs about the incident. (Tr. 2086–2090.) Valenzuela spoke to Scaggs, and he apologized for the incident and said he was just helping Silva. (Tr. 2190.) Valenzuela thought Scaggs and Silva were pointing fingers at each other. (Tr. 2238.) Valenzuela decided to terminate Silva because the procedure had just been discussed at a safety stand down the previous day and he deemed his refusal to follow the procedure as insubordinate.[42] (Tr. 2185–2186.)

[40] Silva recalled completing a survey from HR and the safety manager in the summer of 2012. (Tr. 665.)

[41] Silva believed that the person who discharges the nitrogen secures the strap. (Tr. 865.) Vasquez testified that the person who lowers the unit secures the strap. (Tr. 2043.) According to Valenzuela, both people on the team are equally responsible for ensuring that all safety procedures are followed. (Tr. 2224.)

[42] Silva received a score of 1 on safety in his performance review April 27, 2013. (R. Exh. 36.) He received a 3 for his performance reviews in March and October 2012. (GC Exhs. 127–128.)

O. Preparing for the Election and Negotiations with TTX

On the May 30 version of the GRS network rationalization, Tucson was on the watch list slated as "Fix-TTX contract." San Antonio was still slated for closure, but on an execution agenda table at the beginning of the plan it was categorized for immediate action as "Fix-TTX contract." (GC Exh. 163.)

A Stipulated Election Agreement was reached on June 3, 2013, calling for an election among production workers at the Tucson facility on July 11, 2013. (GC Exh. 6.)

On June 7, 2013, Lave wrote an email to Valenzuela recounting a meeting they'd had to discuss the dos and don'ts regarding the Union campaign. Lave summarized some key items, including not to pick on internal union organizers and to treat them the same as employees he perceived as "pro-GRS." He also instructed Valenzuela to pick up stray union materials from the shop, grounds or bulletin board; have his management team notify him if employees were campaigning during production time; follow TIPS, meaning no threats, interrogation, promises or surveillance; and to make sure his management team was at the top of their game in terms of personnel matters and employee requests. He asked Valenzuela if there were any items on his "to-do list" that would benefit employees, such as supplies or upgrades that could be quickly implemented without "breaking the bank." (GC Exh. 50.)

Lave met with leads, foremen and managers on June 13, 2013, to go over the do's and don'ts of the Union campaign and election. (GC Exhs. 51, 52, 75–76; Tr. 528.)

On June 14, there was a meeting at TTX with Torra, Ferguson and Stuckey, Harmsworth and Cutrone. They discussed a revised plan to have Tucson and San Antonio as dedicated TTX facilities. (R. Exh. 68; Tr. 2460.) GRS proposed having both Tucson and San Antonio dedicated to TTX, with improved inventory levels, faster tracks (referred to as OSOs), faster turn times, and a labor rate reduction of $7 per hour. (Tr. 2460, 2514.) They still needed information from TTX about volume. Cutrone and Lent asked GRS to prepare a chart with assumptions based on different hours of work TTX would potentially be supplying. (Tr. 2514–2516.)

On June 14, Lave sent out the first of a series of antiunion handouts to Hudgens, Stewart and Maciel, for distribution to employees. (GC Exh. 52.) All the handouts were provided in both English and Spanish.

The June 20 GRS network rationalization has Tucson was on the watch list slated as "Fix-TTX contract." San Antonio was still slated for closure, but on an execution agenda table at the beginning of the plan it was categorized for immediate action as "Fix-TTX contract." (GC Exh. 164.)

On June 24, Lave asked Valenzuela to distribute to all employees toward the end of their shifts the next day and post on the bulletin board a handout entitled, "**Greenbrier Gives You the Facts ABOUT GOOD FAITH BARGAINING.**" (GC Exh. 57.) It describes good-faith bargaining and warns that parties may negotiate for a long time without coming to an agreement, and states that first contracts often take several months to negotiate. The handout also notes that the terms of the agreement are often determined by which party has the most leverage, and that for the union, a strike is often the best leverage. If a strike occurs, particularly in today's economy, employees may be replaced by bringing in workers from other facilities or hiring replacements. They handout finally notes that production may be shifted to other facilities during a strike.

On Wednesday, June 26, per Lave's instructions, Valenzuela distributed another handout entitled "**Greenbrier Gives You the Facts ABOUT WHAT MIGHT OR MIGHT NOT BE IN A CONTRACT**." It warns that the Union is a business with its own interests and therefore it may negotiate terms that benefit it but not the employees. It states that the Union may give away something of value to employees in exchange for the employer agreeing to deduct union dues from employees' paychecks. The flyer states that in the recession economy, contracts have required economic give-backs and reductions in wages and/or benefits, and that the union has misled them if they think it could not happen at Greenbrier. Finally, the flyer notes that unions generally negotiate a common rate for everyone in the same job, likely resulting in some of the highest paid workers being paid less or having their wages frozen until the common rate catches up. (GC Exhs. 55, 57.)

The next day, Thursday, Lave instructed Valenzuela to hand out a flyer entitled, **KNOW THE FACTS ABOUT STRIKES**." It states that if negotiations between Greenbrier and the union deadlock, as they often do, the union can make employees strike. It then lists the "FACTS" about strikes: Greenbrier does not pay employees who are on strike; striking employees may not be eligible for unemployment compensation; Greenbrier can legally discontinue benefits payments for striking employees; Greenbrier can hire permanent replacements for economic strikers; the Union can make members walk the picket line, an employee who refuses or who returns to work can be fined; and union members could be fined for refusing to honor the picket lines of other members. The flyer also points out that the union organizers and officials lose nothing during a strike. It encourages employees not to risk a strike by voting, "NO" on July 11. (GC Exhs. 54, 57.)

Lave distributed talking points to Torra and cc'd Hudgens, Stewart, Maciel, Valenzuela, and Maxey on June 27. (GC Exhs. 29, 57, Tr. 267.)

The first consolidated complaint was also issued on June 28. Also on June 28, Lave and Torra met with employees to discuss the upcoming union election. (Tr. 244–245, 524) There were three or four separate meetings, one or two of which were translated to Spanish. About 20–35 employees attended each meeting. (Tr. 247–248, 319.) J. Martinez recorded the meeting he attended. (GC Exhs. 151, 153; Tr. 1398–1400.)

At the meeting, Lave and Torra informed employees about unions and stated the Company's preference to remain nonunion. Torra said a union encourages unnecessary procedures, eliminates the plant manager's flexibility, and adds unnecessary costs. He said the Tucson shop was in a "very precarious" difficult time, and discussed the financial losses in 2012 and the first 3 months of fiscal year 2013. He noted that they had begun to make money recently, and discussed improvements they had made in tools, equipment, and safety, and adding qualified personnel such as Vasquez. Torra said that a union would be a "step backwards" that would create a barrier between the employees and Valenzuela and "create unnecessary costs and inflexibility."

Lave recalled the layoffs the previous November, and the bad economic situation that had existed. He said they had since made money every month between January and May. He shared that back in November, another company tried to take them over, and that put a scare into the parent company. As a result, the parent company ordered them to fix, close, or sell 8–10 shops, one of which was Tucson. He discussed five facilities he recently had to close, and stated he wanted to keep Tucson open, noting efforts GRS had made to help Tucson. Lave said that the Tucson facility had been making progress, and that a union coming into the company could be disruptive. Specifically, he stated, "if the union comes in, that could possibly slow down our progress we're making . And this critical time for us, we are needing to get more profitable here, so the parent company allows us to keep Tucson open." (Tr. 249–252, 539; GC Exhs. 151, 153.)

Torra then discussed how a union contract sets firm rules from which employees and management cannot vary. He explained that he had overseen both union and non-union facilities at the same time and thought the non-union facilities had were better run, with better communication and better compensation packages than the union facilities. (Tr. 320.) He also recalled saying that TTX, which provided 80 percent of the Tucson shop's work, prefers not to deal with unions. (Tr. 321–322.) What he specifically said was "Our number 1 customer, who's TTX, either rightfully or wrongfully is adverse to unions. That's why they shop cars with us because they recognize us as a nonunion facility. So the risk I see, what will happen with our number 1 customer?" (GC Exhs. 151, 153.)

Lave then discussed the changes they made in HR after learning that GRS had not been responsive enough in terms of performance evaluations and pay raises, and noted that they were now being done timely, as were requests for time off. He discussed the attendance point audit and rollback of attendance points, noting that with a union he might lose the flexibility to fix problems like the attendance point errors. He pointed out his frustration over the Union filing a lawsuit about this and told employees they were paying an attorney $400 per hour to defend against that. He added that at a time when they were trying to make the plant more profitable, he had to spend money to defend against something he perceived GRS implemented fairly. Lave also reminded employees about holiday gift cards they had received, and the rehiring of some employees, attributing these perks to the flexibility they enjoyed by being nonunion. (Tr. 273.) He again expressed frustration because the Union filed an unfair labor practice charge because of the gift cards, so he had to pay $400 an hour to defend against it. He then conveyed that the SMW filed another unfair labor practice charge about pay raises employees received, expressing frustration over having to spend money to defend these lawsuits at a time when they were trying to make the shop more profitable. Lave and Torra ended the meeting by fielding questions from employees.

On July 1, Greenbrier sent out a press release announcing facilities reductions and leadership changes in its wheels, repair, and parts segment. Specifically, the release stated that in Greenbrier's multi-step plan to enhance margins and improve capital efficiency, it planned to sell or close 8 of its 38 wheels, repairs, and parts facilities. (R. Exh. 70.)

On July 2, Lave instructed Valenzuela to distribute to all employees toward the end of their shift, and post on the bulletin board, a handout entitled, "SMWU Financial Information." (GC Exh. 57.)

On July 3, Lave gave the same instruction to Valenzuela for a handout entitled "**Greenbrier Rail Services, FACTS MATTER, *TOP TEN WAYS THE SHEET METAL WORKERS CAN COST YOU MONEY.*"** It points out the Union would cost about $450 per year or more in union dues, initiation and reinitiation fees, and union fines, noting that in 2012 Local 359 collected fines from members in excess of $1,565,529. It also describes assessments to support a strike or organize other companies, notes that strikes can result in loss of benefits and fines for those who cross the picket line and lockouts preventing union employees from returning to work. It also discusses reduced overtime, pointing out that unions have incentive for companies hire more employees rather than have current employees work overtime. The handout also discussed contract concessions, the risks of collective bargaining, and super seniority for stewards, resulting in employees with real seniority potentially being laid off before a more junior employee who serves as union steward. (GC Exh. 53.)

Lave instructed Valenzuela to do the same for "**6 Important Facts You Should Know about Union Representation**." (GC Exh. 57.) The handout notes that, as a right-to-work state, employees in Arizona cannot be compelled to pay union dues, but the union would still be the employees' representative for all employment-related matters. It notes that if employees do not join the union, they may be prevented from voting on important matters, such as contract proposals or whether to go on strike. The flyer tells employees they would no longer be able to deal directly with management if the union won the election. It further states that there is no contract between the union and its employees, and that the union's promises are not legally enforceable. With regard to the Union's obligations to treat employees fairly, the flyer states:

> The union can make its own decisions about how to represent employees. Those decisions are lawful even if they seem unfair to you, as long as the union is not completely "arbitrary" or acts in "bad faith." Some courts have described this duty as the weakest obligation known to the law.

Next, the handout informs employees that union dues can be changed by majority vote without any individual employee's consent. Like other documents, this handout warns employees that they can be fined for crossing picket lines to return to work in the event of a strike, and notes that even though nonmembers cannot be fined for working during a strike, some unions have been found guilty of doing this anyway. (GC Exh. 60.)

Lave and Maciel conducted another set of mandatory meetings at the Tucson facility on July 9, 2 days before the election. One of the meetings was translated to Spanish. They created and reviewed talking points and used them during them meetings. (Tr. 276–278; GC Exh. 30.) J. Martinez recorded the meeting. (GC Exhs. 154–155.)

Lave started by telling the employees that without the union, employees can come directly to management with concerns, and they want to continue to talk with employees one-on-one. He mentioned that the union, by federal law, has the right to choose which disputes and grievances to address with management, and offered his opinion that this was not fair or right. Lave recounted his personal experience as an employment attorney getting calls from employees who were angry because the union wasn't attempting to help them with their grievances, and he would explain to them that he could not help them at all. He said he could not help them sue their employer or union because the way the Federal law was written, the Union can pick and choose what disputes it wants to bring to the company's attention. Lave talked again about GRS's financial situation, and how Tucson was one of six shops on a watch list. He mentioned that the Tucson facility was headed in the right direction, and was concerned that if the union was voted in the momentum would be "shattered" because "we're going to have to deal with contract negotiations and all the other disruptions a union will bring in here." Lave said that Bill Furman (the CEO) announced to the shareholders that eight shops were being closed down; Lave had already closed four, and was tired of closing shops. He noted how hard all the employees had worked to turn things around, and stated he did not want the union to come and cause things to go the other way. He said they all could vote on Thursday, in two days, and told them the times they could vote. Lave said there would be an election agent from the government who would check them and give them a ballot. He told them they could vote either way, but "we encourage you to vote no." He also conveyed that even if they signed an authorization card, they could still choose whether they wanted to vote yes or no. He encouraged everyone to vote, noting the results would be based on the majority of who votes. He concluded by thanking them for their time and fielding questions.

Also on July 9, Lave instructed Valenzuela to distribute to all employees toward the end of their shifts, and post on the bulletin board, handouts entitled, "**Have the Sheet Metal Workers told you about Article 17**" and "**Facts Matter – There are Risks in Collective Bargaining**." (GC Exh. 58.) The article 17 handout describes article 17 of the Sheet Metal Workers' Constitution, stating that it allows the union to put members on "trial" and penalize members it finds guilty. Sample penalties include reprimands, suspensions, expulsions, and fines which can be in the thousands of dollars. The flyer tells employees the Sheet Metal Workers can discipline members for failing to pay union dues, seeking other representation if they become dissatisfied with the Sheet Metal Workers, interfering with union business, returning to work during a strike, and violating union officials' orders. (GC Exh. 60.)

Lave instructed Valenzuela to do the same for "**Greenbrier Gives You the Facts . . . About the Business Called the Sheet Metal Workers Local 359**." (GC Exh. 60.) The handout informs employees that the Sheet Metal Workers is a business, stating that Local 359 charges up to $50/month in dues alone. In 2012, the Local 359 collected more than $2.1 million in dues, fees and fines from members but spent only $734,746 on representing employees in its bargaining units. Over seven officers made more than $50,000 in 2012, five of them made more than $85,000 and three made $100,000 or more. It rhetorically asks why employees should spend money on a union when the can guarantee nothing in return, and notes that employees could instead save for college tuition, a vacation, retirement, or a house payment. It concludes by telling employees not to throw their money down the drain and to vote no in the election.

Another flyer states: "Q. Why is a union not like a new car? A. Because you can't test drive a union." The flyer tells employees that it is very difficult to get rid of a union once it is voted in, and impossible during the first year. It further states that if Greenbrier and the union negotiate a three-year contract, employees would be stuck with the union another three years even if they were dissatisfied with the contract. It informs employees of the narrow window for decertification of a union and notes that Greenbrier could not assist employees. Finally, it warns employees that usually once a union is in, it is in "for the long haul" and the decision to vote for the union cannot be reversed easily. The concluding sentences state, "Don't drive down a one-way street. VOTE NO." (GC Exh. 60.)

Employees also received, "**Greenbrier Gives You the Facts . . . ABOUT WHAT CHANGES IF THE UNION WINS THE ELECTION**." It delineates the job positions the union will represent, and states the union will speak for the employees in those positions whether the employees want them to or not. It tells employees their individual voices will often be "drowned out by the voice of the Union." The flyer tells employees they will be limited in their ability to deal directly with managers and supervisors, and tells them much of their personal information and business with Greenbrier may no longer be confidential. It states that what individual employees think is important often will not be included in negotiations.

The next part of the handout states, **Do you know . . . THERE ARE RISKS IN COLLECTIVE BARGAINING**. The handout then tells employees what the law says, quoting from various NLRB decisions. The handout emphasizes things the union can give up during bargaining. The final citation states

> **Are there guarantees in the collective bargaining process?** *"Collective bargaining is potentially hazardous for employees, and as a result of such negotiations, employee could possibly wind up with less benefits after unionization than before." Coach & Equipment Sales*, 218 NLRB No. 51.[43]

The flyer ends by reminding employees they could wind up with more, less, or the same that they have now, and tells them to vote "no" union. (GC Exh. 60.)

The next section of the handout begins with: "**CAN YOU TRUST THE SHEET METAL WORKERS?** THE UNION CLAIMS IT'S "AN OPEN BOOK" THEY SHOULD EXPLAIN WHY SO MANY UNION OFFICIALS CAN'T KEEP THEIR HANDS OFF OTHER PEOPLE'S MONEY?" The handout states that since 2002, at least 10 Sheet Metal

[43] This citation contains an error, and should be 228 NLRB No. 51. The case cited at 218 NLRB No. 51 is *Globe Manufacturing Co.,* and it contains no such quote.

Workers have been found guilty of corruption or embezzlement, and lists the offenses. It rhetorically asks employees why they would risk putting their money in the hands of Sheet Metal Workers officials and why they would trust what anyone associated with the Sheet Metal Workers says. It concludes by telling employees not to get fooled by the Sheet Metal Workers, and to vote NO. (GC Exh. 60.)

The last part distributed was a repeat of the "Top Ten Ways" handout, discussed above.

P. Decline in Employee Support for Union and the Election

The Union had been meeting with employees about once a month, but as the election grew closer they tried to meet every other week. Sudyam noticed that attendance started diminishing, along with support. The individual who agreed to be the secondary observer at the election withdrew and would not communicate with the Union. The day before the election, the employee who agreed to be the primary observer contacted the Union and said he could not do it because he feared repercussions. Ramos, who did not work for Greenbrier anymore, agreed to observe. (Tr. 1850–1852; 1881–1882.)

Jesus Barajas was the observer for management. He still got to cast a vote. (GC Exh. 77.) Of 72 eligible voters, 13 employees voted for the Union, 45 voted against the Union, and another 14 votes were challenged. (GC Exh. 7.)

Q. Objections to Election

The Union filed objections to the election with the Board on July 17. Objections 1–9 are encompassed in the unfair labor practices complaint. In addition to the unfair labor practice allegations, the Union made four other objections.

Objection 10 asserts that GRS provided an inaccurate *Excelsior* list that did not use dates from the stipulated agreement on June 3, 2013. Objection 11 asserts that during the election, management was approximately 70 feet away from the polling location. Sudyam observed Valenzuela and another person standing roughly 70 feet away from the polls and the employees had to walk past them to vote. (Tr. 1864–1865.) Objection 12 asserts that a known supervisor was permitted to vote after polls had closed. Miguel Solomon cast his ballot subject to challenge on the advice of the NLRB agent. (Tr. 1867–1868.) Objection 13 contends that the Respondent, during the critical period, intimidated union supporters in a manner so egregious that an election observer could not be secured from the eligible voter list.

R. Continued Meetings with TTX and Closure of Tucson Shop

On July 22, Torra, Ferguson, Glenn and maybe Stuckey met with Harmsworth, Cutrone and TTX's CFO Vickie Dudley.[44] (Tr. 2648.) Glenn recounted the meeting in a July 23 email to various individuals. He noted that GRS laid out a menu of options which increased the price 25 percent if the workflow was left as is, but decreased costs by consolidating all the work at the Tucson shop. He also noted Harmsworth's skeptical reaction and her concern that they did not need all the capacity at Tucson so they should not have to pay for it. He recounted feedback from Cutrone to Ferguson that they were insulted and "hell will freeze over" before they agreed to pay for it. He expressed his belief that Tucson and San Antonio would be added to the closure list, and asked Abel to prepare a budget with the sale/shutdown of Tucson and San Antonio. (R Exh. 69.)

On July 24, Abel raised the possibility that they sell part of Tucson's land that was not being used for the repair shop. He asked Torra what percentage of the land could possibly be sold to maintain the shop size needed for TTX's newly decreased demands, noting the reduced volume TTX was interested in changed the dynamics. Torra responded that the about 15% of the land was not used for the repair shop, and asked if he should obtain the services of a realtor. Ferguson responded to the possibility of downsizing the Tucson shop by noting that the capacity was originally built to meet TTX's demands, and expressing frustration that TTX had always said they have more work available than GRS could possibly do. He suggested that possibly an updated analysis TTX had recently performed changed the forecast. (R Exh. 69.)

Under the proposed rate structure, the hourly rate at Tucson was $13.03 higher if TTX sent 6000 hours of work per month, $10.64 higher at 7,000 hours, and $8.09 higher at 8000 hours, which was San Antonio's capacity. If TTX sent 10,000 hours of work, the hourly rate was slightly higher than 8000 hours at San Antonio. At 11,000 hours and above, the hourly rate is less than the hourly rate for 8000 hours in San Antonio. If they could send 13,000 hours of work to Tucson, the hourly rate would be $6.50 less than 8000 hours in San Antonio. (GC Exh. 257.) At the time, there was not more than about 9500 work hours between the two shops. (Tr. 2539–2540.) Between January and July 2013, TTX was billing about 6000 hours a month to Tucson. San Antonio averaged about 5000 hours per month. (Tr. 2653.)

Prior to this, the hourly rates in Tucson and San Antonio were the same, regardless of hours of work. (GC Exh. 277.) The highest hourly rate in the new structure (for 6,000 hours) had rates in Tucson $10.01 higher than they had been previously and rates in San Antonio $3.02 lower than they had been. Tucson came out ahead of its old rate at 8000 hours. The Mira Loma rate was significantly lower than even the lowest rates of Tucson or San Antonio because TTX owns the facility, property, and equipment at Mira Loma, and GRS leases it. (Tr. 2673–2674; GC Exh. 278.)

The July 25 GRS network rationalization listed San Antonio as a sell/close location and lists Tucson on the "Fix/Watch List" with "Fix-TTX contract." San Antonio and Tucson were both denoted as "Dedicated TTX Shop or Closure." For San Antonio, the "Fix, Close or Sell Recommendation" was "Fix (as TTX dedicated shop) or alternatively close (most likely)." The comments stated:

> As of most recent discussions with TTX on July 22nd, they will likely not utilize SA under our proposed compensation structure requirements so we will likely proceed in closing the shop by December 31. Discussions with TTX on location options, primarily as a dedicated TTX shop (along with Tucson) with significant change in compensation structure required,

[44] Harmsworth thought assistant vice president of maintenance and planning Mike Kelly was also there.

> including TTX responsible for providing material and carrying inventory. (GC Exh. 165.)

For Tucson, the "Fix, Close or Sell Recommendation" is somewhat confusing, stating "Fix as TTX Dedicated Shop Closure." There was a note that union campaign activities have recently begun again following last year's election to stay nonunion. The comments stated:

> As of most recent discussions with TTX on July 22nd, they will likely reject our proposed compensation structure requirements. We are currently exploring other alternatives including sale & leaseback to Indipendant (sic) party to decrease high capital structure. If not (sic) alternatives found we will likely proceed in closing the shop by December 31. Discussions with TTX on location options, primarily as a dedicated TTX shop (along with Tucson[45]) with significant change in compensation structure required, including TTX responsible for providing material and carrying inventory. *Proposed TTX agreement "fix" capital reduction of net~$300K-$1.6M, primarily reduction of inventory (TTX responsible for material) net of additional capital improvement.*

(GC Exh. 165.)

After the meeting, TTX officials looked at where cars that were bad-ordered, i.e. taken out of service due to physical condition, originated from, and the majority were from California and Oregon. The Los Angeles area is very congested, so TTX prefers not to send them out of state for repair. They decided routing them to Tucson did not make the most sense. (Tr. 2657–2658; GC Exh. 279.) TTX deemed San Antonio to be an important facility because of its location in Texas, where its largest customer, Union Pacific, routes many of their cars.

The GRS network rationalization plan on August 16, 2013, described Tucson and San Antonio as "Dedicated TTX Shop or Closure" with the same recommendations as the July 25 plan. The same holds true for the September 11 plan. (GC Exhs. 166–167.)

On August 27, Harmsworth sent an email to various individuals recounting a conference call with Glenn and Ferguson where she informed them they would no longer be sending cars to Tucson. Of the 6000 hours per month consumed in Tucson, 4500 were to go to the WRRC,[46] and the rest to Chehalis and San Antonio. She noted that no longer routing cars to Tucson was positive for Fleet cars because cars bad ordered in California would be worked in California. She also noted that Glenn appreciated them finding a solution that enabled GRS to close Tucson.[47] They then discussed San Antonio, and Harmsworth conveyed that closing Tucson and potentially closing San Antonio would be a hardship to TTX. She told Glenn that in light of them finding a solution to the Tucson problem, they wanted San Antonio to stay open, and they only needed 5,000 to 6,000 hours per month there. She also requested a lower labor rate, and noted that "allegedly" they would receive a lower rate.

Another meeting at TTX took place on August 29. Torra, Ferguson, Glenn, and Bobby Hatfield, the assistant vice president production, were present for GRS. Harmsworth, Cutrone, and Lent, among others, were present for TTX. During the meeting, TTX said GRS it would no longer send cars to Tucson because they liked the rate, structure and geographical location of San Antonio better. (R. Exh. 71; Tr. 2474.) They did not have as much volume as GRS wanted, and they had lower volume than they had expected. This was due to a maintenance reduction that TTX implemented on August 1. During a maintenance reduction, the customer stops sending cars to repair and maintenance facilities in order to save money. (Tr. 2520–2522.)

Once informed of TTX's decision to no longer use the Tucson facility, GRS officials, including Ferguson, determined it would be closed. They did not consider keeping it open to service other customers, such as Pacer, or to continue servicing GRS's own railcars.[48] According to Ferguson, the Tucson shop was built for TTX and could not service other railcars, such as tank cars. Ferguson, Glenn, Torra, Abel and Hatfield assessed their options, and decided there were no options other than to close down the facility. (Tr. 2522–2524; 2528–2532.)

Federico recalled that Danny Dicochea, who negotiated contracts with railcar companies, told him that Brandt would send 40 to 50 railcars to the Tucson facility for repairs, and could also send all their vehicles needing basic service within a couple of weeks. According to Federico, Dicochea also spoke with Pacer, who agreed to keep sending them cars to keep them afloat until TTX was able to send more work. (Tr. 605–606.)

Torra was surprised by the decision to close the Tucson shop. He thought it made more sense to close San Antonio and leave Tucson open because Tucson had a lot more capacity and more capital was invested there. Also, based on the expectation of San Antonio closing, GRS had let the number of employees there dwindle down by attrition. (Tr. 2477.)

Following the decision to close the Tucson facility, TTX routed the cars to Mira Loma or San Antonio. This resulted in about 2000 more cars being routed to San Antonio, for a total of about 7000 cars. (Tr. 2663–2664.) An equivalent labor rate in Tucson would require a volume of more than 9000 cars. (GC Exh. 257.)

On September 5, employees were issued Worker Adjustment and Retraining Notification Act (WARN) notices. (Tr. 628.) The managers told them the Tucson plant would be closing because TTX had pulled their contract. (Tr. 604.) All nonmanagement employees were offered transfers along with relocation money to either Mira Loma, San Antonio, Cleburne, Omaha, or Chehalis. (R. Exhs. 94–95.) Employees who chose not to relocate were provided a severance and terminated.

The last TTX car to be repaired in Tucson left the facility in January 2014. (Tr. 1111, 2661–2662.)

[45] This clearly should be "San Antonio" and most likely was cut and pasted from San Antonio's page.

[46] This acronym was not defined at the hearing.

[47] Harmsworth addressed this comment at the hearing, stating that Glenn appreciated a solution, and had made it very clear GRS needed to fix, sell, or close Tucson, San Antonio and other facilities due to Wall Street pressure. He never indicated a preference to her. (Tr. 2668–2675.)

[48] GRS offered to continue to service Pacer cars in San Antonio, Chehalis, or any other location that worked for Pacer. (Tr. 2530.)

At the time the shop closed, TTX accounted for roughly 70 percent of the total hours billed from the Tucson shop, and about 58 percent of the total railcars repaired. Non-TTX work would have supported 17 full-time employees. Work on the Respondent's own railcars generated an average of $157,240 per month in revenue and work on non-TTX cars generated an average of $255,919 in monthly revenue. (GC Exh. 268; GC Br. Exhs. A, B, C.)[49]

S. Closure of other Facilities

The Kansas City, Missouri and Canada repair facilities closed in July 2013. The Mexico City repair facility and wheel facility sold at end of 2013. The Corwith, Illinois facility closed in January 2014 because GRS proposed to raise labor rates close to 20 percent and its customer, Burlington Northern Santa Fe, would not accept them. The repair facility in Beckman, Texas also closed, and the wheels facility in Elizabethtown, Kentucky, closed in 2012. (Tr. 327, 2718–2734.) There were not union organizing drives at these facilities.

III. DECISION AND ANALYSIS

A. The Layoffs

The complaint, at paragraphs 6(a) and (b), alleges that the November 12 and 13 layoffs violated Section 8(a)(3) and (1) of the Act.

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Rights guaranteed by Section 7 include the right to engage in union activities and "concerted activities for the purpose . . . of mutual aid or protection." Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

In assessing whether an action has been taken against an employee for unlawful reasons, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor for the Company's adverse action. Once the General Counsel makes a showing of discriminatory motivation by proving the employees' protected activity, the employer's knowledge of that activity, and the Company's animus against the protected conduct, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the protected conduct. See *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 4 fn. 18 (2013); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade by a preponderance of the evidence that the action would have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989).

The employees were clearly engaged in protected activity when they began to organize in the fall of 2012. The Respondent contends that GRS did not know about these efforts, pointing to evidence that the organizers and employee leaders were trying to keep the organizing drive under wraps.

It is undisputed that employees did not wear union insignia or, in other like fashion, display their support for the Union. It is also undisputed that employees did not sign cards in management's presence. However, the evidence is very clear that several managers knew the employees were talking about unionizing. As set forth in the statement of facts, in late October, Foreman Torres heard rumors that the Union was coming around again. During the October 31 meeting Lave conducted with foremen and leadmen to discuss union organizing, he was aware of "some discussion out there in the shop about trying to bring the UTU or some other union back in," and knew employees were "somewhat active." Lave heard from two of the supervisors at the meeting that a couple of employees were meeting offsite with union organizers. In addition, as detailed above, some employees shared information about the union drive, including progress in getting cards signed, with supervisors or leads. Leadman Acuna was aware employees were trying to organize, and the evidence shows that Managers Tarpley and Valdez and Foreman Torres also were aware of union activity.[50]

In the face of this evidence, I find the blanket denials of knowledge by the various management officials who testified lack credence.[51] Accordingly, I find the General Counsel has met its burden to show the Respondent had knowledge that employees were organizing, or at the very least planting the seeds to do so.

The General Counsel need not prove the employer's knowledge of any specific employee's opinion or sympathies in the context of a mass layoff conducted with the unlawful purpose of discouraging union membership. See *Birch Run Welding & Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179–1180 (6th Cir.1985). The mass discharge itself is unlawful rather and the General Counsel therefore is "not required to show a correlation between each employee's union activity and his or her discharge." *Pyro Mining Co*., 230 NLRB 782 fn. 2 (1977).[52]

[49] I rely on the underlying data admitted into evidence at the hearing and note the exhibits the General Counsel submitted with its closing brief are merely summaries of that data. They are not admitted to establish any evidence not already a matter of record at the close of the hearing, but are utilized for ease of reference only.

[50] Though Torres and Tarpley did not testify, I find the hearsay evidence of their knowledge is reliable because it is corroborated by an abundance of evidence that management knew there was talk of organizing in the fall of 2012.

[51] Specific credibility determinations are made in context throughout this decision. I note, however, that some of the managers, particularly Lave and Torra, couched a good deal of their testimony with various hedging terms, such as "may have," "would have," "if I recall," etc. . ., as pointed out by the General Counsel. Though some of the events took place as early as the fall of 2012 and some uncertainty in memory would be exptected, there is a great deal of testimony about large important events, such as the layoff, as well as more recent events, that should not legitimately be uncertain.

[52] For this reason, the Respondent's arguments that the layoffs did not target union supporters fail.

Instead, the General Counsel's burden is to establish that the mass discharge was ordered to discourage union activity or in retaliation for the protected activity of some. "A power display in the form of a mass layoff, where it is demonstrated that a significant motive and a desired effect were to 'discourage membership in any labor organization,' satisfies the requirements of § 8(a)(3) to the letter even if some white sheep suffer along with the black." *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964). See also *Delchamps, Inc*., 330 NLRB 1310, 1317 (2000); *Weldun International*, 321 NLRB 733, 734 (1996) (violation where the employer did not select employees for layoff based on their support for the Union, but the layoff was part of an effort to discourage employees from supporting the Union), enfd. mem. in part 165 F.3d 28 (6th Cir. 1998).

A discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc*., 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc*., 989 F.2d 1468, 1473–74 (6th Cir. 1993); *Affiliated Foods, Inc*., 328 NLRB 1107 (1999)(statements); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment). The Board will infer an unlawful motive or animus where the employer's action is "'baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.'" *J. S. Troup Electric*, 344 NLRB 1009 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995)); See also *ADS Electric Co*., 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Timing of the layoffs can, by itself, raise a strong inference of both knowledge and animus. *Best Plumbing Supply*, 310 NLRB 143, 144 (1993). In the instant case, the timing of the layoffs occurred just 4 days after the Union had collected cards from a majority of the production employees. Even if the decisionmakers did not have this specific knowledge, it is clear they knew union organizing activity was occurring in the time period immediately preceding the layoffs.

Maciel and Stewart's conflicting reports of when they decided on the plan to close all but two shops and lay off workers to scale, as well as their conflicting reports about the process for choosing which employees to lay off, casts consideratble doubt on the legitimacy of these actions. It is clear no action to lay off the employees could take place until Torra approved the plan, which did not occur until the plant manager's meeting November 5–7. Maciel did not begin working on the list of production employees to be laid off until Thursday November 8. He claimed he and Stewart went through the list systematically, employee by employee, to determine who to retain, considering skill, performance, safety, and cross-training. By Stewart's account, he left it to Maciel to determine who would be retained because he was not familiar enough with the direct work force to know the employees' skills. Moreover, both Stewart and Maciel recalled that Maciel consulted with production manager Valdez, yet Valdez' testimony belies this. The Respondent addresses this inconsistency in its brief, stating that because Valdez did not know of the impending layoffs, "Naturally, Mr. Maciel did not ask for recommendations about who should be retained but, rather, had general conversations with him." (R. Br. p. 18, fn. 19.) This argument is a stretch on its own, and is significantly weakened by the parallel inconsistencies about Valdez's input into who should be rehired, detailed below, where no concern over spilling the beans about a layoff was present. See *Maywood, Inc*., 251 NLRB 979, 993–994 (1980) (inconsistent testimony regarding as to who made discharge decision and the reason for the discharge evidence of pretext to hide the real reason, advocacy for the union).

One of the key reasons the Respondent cited for the layoffs was poor labor rate efficiency due in part to a new and undertrained work force. Yet, nobody looked at performance evaluations or consulted the leadmen and foreman about which employees were the best and most efficient performers. I find it particularly telling that it was possible to run production reports in the Kronos system to track employee production, yet this did not occur.[53] Moreover, Jaime Hernandez, one of the Tucson shop's "strongest men" who had just received a raise, was not retained. In addition, Maciel's testimony about the factors he considered did not include attendance, and he said he did not look at any records. Yet Maxey testified Maciel and Stewart considered attendance and she provided them with records.

The haste with which the layoffs were conducted is strong evidence that the Respondent's motivations were tainted. It is clear there was particular urgency for the layoffs to occur on November 12,[54] as shown by the 11th hour HR analysis over the weekend[55] and the lack of any meaningful deliberation geared to meet stated business objectives. The "general information" relied upon to determine which of the employees to retain and which to lay off is the only kind of information amenable to such a quick turn-around. If the aim was to send a message quickly before organizing efforts gained more traction, this cursory form of decision-making makes sense. If the aim was to retain the most productive employees in order to maximize labor efficiencies, it does not.

There was also inconsistent testimony among managers about whether or not there was a lack of work, but the evidence clearly demonstrates employees were working overtime and additional employees were being hired at the time of the layoff.

[53] Though it was not practice in the ordinary course of business to run the reports by employee, it was possible to do so. (Tr. 92.)

[54] I note that November 12, 2012, was Veteran's Day, and as Sudyam testified, the NLRB was closed.

[55] Lave emphasized that his email sent at 12:35 on Saturday night/Sunday morning must be reviewed by Monday.

The evidence of tainted motivation must be viewed in conjunction with strong evidence of animus toward unions. Of the plethora of evidence of antiunion bias, Torra's patent misstatement that TTX does not like doing business with unionized shops, and the accompanying threat that they could lose their biggest customer if the Union came in, is the most striking. Other misinformation and threats, discussed fully below, make clear that avoiding unionization at the Tucson plant was an extremely high priority.

Other evidence of animus includes the discipline the Martinez' received for their attempts to organize for the UTU in 2011. Witnesses, including Maxey, however, testified that it was common for employees to discuss nonwork topics such as sports and family.

Based on the foregoing, I find the General Counsel has established that the Respondent's antiunion animus was a motivating factor in the decision to lay off 30 employees on November 12. As such, the burden shifts to the Respondent to prove it would have taken the same action even in the absence of union activity.

GRS argues that the layoffs were economically motivated, prompted by the directive to take swift and decisive action following months of financial losses and a particularly poor showing for October. As already stated, however, the manner in which Stewart and Maciel decided which employees to lay off, does not jibe with the stated desired end of increasing labor efficiency. As Lave pointed out, the AAR writeup employees Stewart and Maciel proposed to retain each had only 3 months' experience, while they proposed to lay off Anderson, who had 6 years, and another employee who had 9 months. Anderson had been slated to be the AAR billing supervisor in the summer of 2012, and he in fact became the billing manager, so GRS cannot legitimately argue that he was slated for layoff because he did his job poorly. Moreover, among the employees retained were three from a temp-agency, each of whom had been working at the Tucson shop for less than 2 months, yet a strong performer who had just received a raise based on his good work was let go. The previously detailed inconsistencies in Maciel and Stewart's respective versions of how employees were chosen casts further doubt on the layoffs' legitimacy.

The financial argument is also weakened by the fact that the financial statements in September and October did not accurately reflect the true state of the financial situation at the Tucson shop due to conversion to the Syspro system and some unusual expenses, articulated in the statement of facts.[56] Moreover, as the General Counsel points out, other shops experienced comparable losses without resultant mass layoffs. *Montgomery Ward & Co*., 234 NLRB 13, 15 (1978) (Less drastic action taken at comparable facilities without union activity is evidence of unlawful motivation.) The Respondent argues the Tucson facility's high capital structure meant that its performance had a significant impact on return on investment capital (ROIC), and therefore it was imperative that the Tucson shop perform well. This evidence derives from an email Abel sent to Torra in response to Torra's request for information about the cost of closing the Tucson facility. There is no evidence that this information was conveyed to or relied upon by Stewart and Maciel when they decided to downsize the facility.

The recall of most of the laid off employees to build the work force back up to essentially the same size as it was before for essentially the same reasons, despite employees having been notified that the layoff was permanent, is another indication of pretext. *Resistance Technology*, 280 NLRB 1004, 1005 (1986.) I also find significant the departures from past practice. See *Montgomery Ward*, supra. Morrison stated that when he conducted layoffs in 2009, it was more measured, occurring over a year, and was "a group effort from leadmen, supervisors, managers who we wanted to keep." (Tr. 101–103.) Lave said GRS' protocol was to look performance quality, safety record, attendance, and whether the employee is cross-trained in other jobs. Clearly, these factors were not considered in any meaningful way.

The General Counsel asserts that the fact GRS was still hiring for its Tucson shop as late as early November is evidence of pretext. If this was the only evidence aimed at showing unlawful motivation for the layoffs, I would not find it persuasive. The Respondent's conduct as a whole, however, persuades me that the layoffs were a power play intended to nip organizing efforts in the bud, in violation of Section 8(a)(3) and (1). See *Carbonex Coal Co.*, 248 NLRB 779, 797, 798-799 (1980), enfd. 79 F.2d 200 (10th Cir. 1982).

Objection 3 mirrors this complaint allegation and is sustained based on the above analysis.

B. The Rehires

1. Failure to rehire

Paragraph 6(d) and (e) alleges that the Respondent violated Section 8(a)(4), (3), and (1) of the Action by refusing to rehire various employees in March 2013.[57]

The Board applies the framework set forth in *FES*, 331 NLRB 9 (2000), supplemented by 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), to analyze allegations of discriminatory failures to hire. The General Counsel has the burden to prove:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

If the General Counsel establishes these criteria, the burden shifts to the employer to prove it would not have hired the applicants even in the absence of their union activity.

[56] There were also inexplicable discrepancies in the scorecards. (Tr. 2295; R. Exh. 49.)

[57] The employees named in the complaint are Alex Amador, Oswaldo Chavira, Ricardo Martinez, Jesus Ruiz Oscar, Guillermo Gonzalez Pico, Guillermo Murguia, Jose Angel Ortega, and Oscar Salinas.

It is undisputed that the Respondent was hiring in March 2013, and the focus was to rehire former employees who knew the job and did not need training. The former employees obviously had experience and training relevant to the positions. The General Counsel has thus established the first two elements of the *FES* test.

The only remaining question is whether antiunion animus contributed to the decision not to rehire the applicants. I will first discuss evidence of animus from the process of re-hiring the employees generally and then discuss evidence as it applies to individual employees. It is clear the process was geared to rehire the employees who did not exhibit signs of being upset about the layoffs and who did not question the rehire process. As the General Counsel points out, while the goal was to increase headcount and profitability by rehiring former employees with experience welding and working on rail cars, past performance is absent from any documentation of the rehire process. Indeed, there is no evidence of how any objective criteria were applied. Valenzuela did not review performance records of the former employees. Instead, the focus was on how the former employees acted when they came to reapply. C. Martinez was instructed to keep a detailed log, which Maxey reviewed weekly, describing her interactions with the former employees, including their demeanor when they came to the shop. No similar log was kept for new applicants.

There was no written process for having employees reapply and reinterview. The practice of keeping a log and having it reviewed by higher level HR managers was clearly implemented uniquely for the rehiring of the laid-off employees. Having regional HR management review rehires was also a new practice. As Maxey testified, shortly after she started at GRS in 2012, she learned shops were rehiring people on their own with the discretion of the plant manager. She could not recall other specific employees rehired prior to the rehires at the Tucson shop.

The Respondent contends that evidence concerning the percentage of employees rehired who signed authorization cards refutes any claim of retaliation. I find this unpersuasive. First, as the Respondent repeatedly notes, GRS managers did not know the specifics of who signed cards. The layoffs had been a power play meant to send a message to all employees. The closely following rehires, necessitated by the large volume of work at the Tucson facility, were extremely subjective and geared toward trying to figure out which employees were upset about the layoffs and likely to cause trouble or question the terms of their employment. In other words, they were aimed at determining which employees had gotten the message. Regardless, the Board has held that an employer's failure to discriminate against all protected applicants does not bar a finding of a violation. *Zurn/NEPCO*, 345 NLRB 12, 46 (2005); *Fluor Daniel*, 333 NLRB 427, 440 (2001), enfd. in relevant part332 F.3d 961 (6th Cir. 2003) cert. denied 543 U.S. 1089 (2005).

Valenzuela's purported lack of knowledge of the former employees' union activity is likewise unpersuasive. The evidence shows he was not ultimately in control of who was rehired, as illustrated most tellingly by the Respondent's treatment of Omar Ramos.

a. Omar Ramos

Turning specifically to Omar Ramos, I find antiunion animus clearly contributed to the decision not to rehire him. Ramos completed an application on March 25 and interviewed with Valenzuela. The only negative comments about Ramos during the process came from C. Martinez, who noted that he questioned why he had to fill out a new application, stated he thought employees who were laid off should be hired before anyone new, and became angry about having to complete the full application. When Ramos interviewed with Valenzuela that same day, he was calm, showed no signs of hostility, and the interview went without incident. Valenzuela recommended Ramos for rehire. However, after Maxey, Stewart, and Maciel read the email Valenzuela sent stating that Ramos was one of the strong union supporters, "corporate" decided not to bring him back. I find that this, coupled with evidence discussed below with regard to the Respondent's burden, shows that antiunion animus contributed to GRS' failure to rehire Ramos.

GRS must prove it would not have rehired Ramos in the absence of his union activity According to Lave, Ramos was not rehired based on his conduct when he came to apply. Maxey also recalled that he had a history of being argumentative with Madrigal, in particular regarding attendance points, but said the focus in deciding not to rehire him was on his most recent behavior. The problem, however, is that Valenzuela, who actually observed Ramos the day he interviewed, recommended him for hire.

Valenzuela testified that he changed his mind because he later found out that Ramos had "a lot of conflict with employees and supervisors" and the way he treated C. Martinez let him know he was probably "very confrontation and conflict prone." [58] I do not credit this testimony nor do I credit Valenzuela's testimony that he was one of the decision-makers for Ramos. This testimony is belied by C. Martinez' log, which shows she and Valenzuela were informed Ramos was not being rehired. Moreover, the supposed conflict Ramos had with his coworkers and supervisors is squarely contradicted by his most recent performance appraisal, which gives him the highest marks for "mutual respect" and "teamwork and cooperation" with comments like, "He gets along and respects everyone" and "He works good with and around others and pulls out his part of this work as asked upon."

I also find it curious that, at a time when GRS was trying to increase headcount to become more profitable, with a focus on hiring experienced employees who were productive and cross-trained, Ramos' performance history seems to have been ignored. In addition to high marks for getting along with other employees, Ramos also received the highest rating in "Responsibility and Initiative," "Job Knowledge," "Quality of Work," and he exceeded for "Productivity." One of Ramos' strengths was that he "[p]uts out quality work and never says no to anything asked of him" and his supervisor noted, "Omar is a very good and hard worker!" Ramos received a total score of 28 on

[58] Valenzuela testified that he, Maxey, and Stewart decided not to rehire Ramos, but this does not appear to be the case, as C. Martinez' log entry states that Maxey conveyed to Valenzuela "corporate's" decision not to rehire him. (GC Exh. 67.)

an appraisal signed off on by Maxey, among others. (GC Exh. 208.) Yet, despite all the positive comments in Ramos' performance appraisal, Maxey and Lave focused on one comment from Madrigal that Ramos was angry about having to fill out another application.

The record also shows that other workers with lower performance ratings, who would seem less likely to help GRS meet its stated productivity objectives, were hired over Ramos. For example, Jesus Barnes, received a total score of 20 on his most recent performance appraisal, and received the lowest rating, a 1–needs improvement, on "Productivity" with the comment, "Would like to see work output in a more timely manner." He received a score of 1–needs improvement, in "Teamwork", with the comment that he had trouble working with another employee due to a small conflict and he needed to separate personal emotions from job. Carlos Contreras and Brian Perona were also called back as welder repairmen with lower scores than Ramos.

Finally, even though cross-training was generally a factor in determining who should be hired, Ramos, who was cross-trained to weld in the front shop, had worked in the materials department, and had worked as a painter, was not rehired. I find the evidence that Ramos was not rehired based on his union activity is extremely strong, and the General Counsel has easily sustained its burden to prove the Respondent violated the Act as alleged.

b. Guillermo Murguia

Murguia repeatedly expressed interest in coming back to work but was not recalled. At the time he sought to be rehired, management officials from GRS, including Maxey, knew he was named on the Union's unfair labor practice charge. Ramos had over two years of experience as a welder in the Tucson shop. I find the General Counsel has established that antiunion animus contributed to the decision not to re-hire Murguia

The Respondent asserts that Murguia was not hired because he failed to follow the re-hire process by not submitting an application and showing up to the shop uninvited. He was also "obstinate, belligerent with staff" on several occasions.

Murguia, by his own admission, did not complete an application. The Respondent submitted evidence that all employees who were rehired were required to submit an application. This aspect of the rehiring was consistent with past practice. While I find the other reasons for failing to hire Murguia do not withstand scrutiny under the circumstances, I find the Respondent has shown that completing a new application for employment was a legitimate prerequisite for rehire that was uniformly applied to all former employees.[59] Accordingly, I find the General Counsel has failed to prove the Respondent's failure to rehire Murguia was discriminatory.[60]

c. Oscar Salinas

Salinas, a switchman who was laid off in November, filled out an application but was not rehired. Incorporating the evidence of antiunion animus discussed elsewhere in this decision, as well as the focus on Salinas' demeanor when he came to the Tucson shop, I find the General Counsel has met its initial burden.

The Respondent asserts that Salinas did not complete an application. This is contradicted by the evidence, however. He picked up an application and brought it back on March 15, but it was not complete. C. Martinez showed him what he needed to do, and he agreed, with a calmer and more polite demeanor, to bring back the completed application the following Monday, March 18. He returned his returned his application on March 20.

C. Martinez testified that she gave Salinas back the application because it was not complete and he never returned it. I find this is contradicted by C. Martinez' contemporaneous notes, which say she gave him back the application on March 15, and he did, in fact, return it on March 20. The log entry for March 20 shows he returned the application and there is no notation, as there had been on March 15, that the application was incomplete or somehow deficient. Moreover, the failure to rehire Salinas runs counter to the Respondent's stated goals of rehiring experienced former employees who could jump right in and help productivity. There was no evidence presented that Salinas had been performing his previous position as a switchman poorly. Yet, before even contacting Salinas, Federico, who had never worked as a switchman, was hired into the position and trained for it on the job. Accordingly, I find the Respondent's stated reason for failing to rehire Salinas is pretext and the Respondent failed to meet its burden to prove it would not have rehired Salinas absent unlawful motivation.

d. Oswaldo Chavira

After he was laid off, Chavira did the sensible thing by any account and obtained a new job. He was among the first welder repairmen called back to work. On February 4, when he came to fill out an application, he was time-pressed and wanted to see if he liked his new job before deciding whether to return to GRS. C. Martinez said he could bring his application back in a couple of weeks, but there was no guarantee the job would still be open.

Chavira dropped off his application on February 15 and followed up twice with C. Martinez. She obtained Chavira's phone number and emailed Maciel to let him know about his interest in returning to work. Maciel did not recall follow up with Chavira. Incorporating the evidence of antiunion animus discussed elsewhere in this decision, as well as the focus on Chavira's demeanor when he came to the Tucson shop, I find the General Counsel has met its initial burden.

According to Lave's notes, Chavira was not rehired due to bad interview attitude, refusal to complete application, and

[59] The legitimacy of the application goes to the discrimination analysis only, and not to whether there was a duty to bargain over the rehire process.

[60] Because I have found the layoffs to be retaliatory, the remedy of reinstating Murguia is not affected. As the General Counsel notes, Murguia's behavior was in line with that of other employees who expressed anger and frustration over personnel actions they deemed unfair yet were returned to work, so it cannot legitimately be considered after-acquired evidence that would have independently caused his termination. Moreover, the cited behavior, along with the failure to re-apply, would not have occurred absent the unlawful layoff. (See GC Br. p. 88; Tr. 1650–1651.)

delay in eventually completing application. Maciel denied there was an interview, stating, "I don't think I had a meeting with him but he came into the office one day." (Tr. 2389.) Maciel recalled Chavira told him he had another job and needed time to decide whether he wanted to come back.[61] As far as refusal to complete an application, the evidence shows otherwise. The final stated reason is delay in completing an application. The evidence shows, however, that Chavira returned a completed application within 2 weeks of the date he was scheduled to come in and go through the rehire process.

C. Martinez said she generally gave the former employees about a week to turn in their applications. This was not a written procedure, and I find it did not exist in any kind of uniform fashion. For example, when Acuna, who was not on the charge, called one of the foremen and expressed interest in coming back, C. talked to Maxey accommodating Acuna's schedule as much as possible because he was working out at the mines.

C. Martinez' statement that there may not be work available for Chavira if he waited 2 weeks is also squarely contradicted by the evidence showing a plan to steadily, over the next few months, rehire experienced welder repairmen. Chavira, with two years' experience at GRS as a welder repairman, was not hired and less experienced employees were hired, even though it was imperative to increase headcount with experienced employees who could help GRS meet its financial objectives. Oddly, C. Martinez noted that Federico was called on February 4 because Chavira declined to come back to work. Federico, however, had previously been a general laborer and was hired back as a switchman, so it cannot be credibly argued that Federico somehow took Chavira's slot. In any event, GRS continued to add welder repairmen, and the very day before Chavira submitted his application, Stewart and Maciel told Lave they needed to increase the headcount from 57 to 65 over the next 45 days. Under these circumstances, I find the Respondent's stated reasons for failing to rehire Chavira are false and the General Counsel has sustained its burden to prove failure to rehire him was unlawful.

e. Jose Angel Ortega

The evidence shows that in March, C. Martinez tried to contact Ortega and told his wife to have him come apply. When he came by in early May, he was told to pick up an application. As there is no evidence Ortega completed the application process, I find, for the same reasons set forth for Murguia above, that the Respondent has met its burden to prove that that its failure to rehire Ortega was for a legitimate reason.

2. Refusal to consider

While the former employees discussed above were considered and not hired, other employees were apparently not considered for rehire. Specifically, the evidence shows that Ricardo Martinez, Alex Amador, and Jesus Ruiz were not considered for reemployment.

The Board in *FES,* supra, articulated the following test for cases involving discriminatory refusal-to-consider violations. The General Counsel must first show: (1) the respondent excluded applicants from a hiring process, and (2) antiunion animus contributed to the decision not to consider the applicants for employment. If the General Counsel meets this burden, the respondent must prove it would not have considered the applicants even absent their union activity or affiliation.

Ricardo Martinez submitted an application but was not rehired. C. Martinez' log lists him as a painter, but at the time of the layoff his position title was general laborer. He was not interviewed and there is no documentation concerning whether or not he was considered for rehire.[62] Alex Amador, a painter, was never contacted for rehire, nor was Jesus Ruiz, a general laborer. Other former employees who were laid off in November also were not contacted for re-hire.

I find these former employees were excluded from the rehire process. The evidence shows that the plan was to recall experienced former employees who could hit the ground running before hiring from the outside. In fact, Torra believed GRS tried to rehire all of the laid-off employees. (Tr. 334.)

With regard to the painters, the evidence shows that Morales, who was not listed on the charge, had previously submitted an unsolicited application on February 7 to be a painter. He was re-hired on April 1 as a welder repairman. His previous wage with GRS had been $13.01, and his new wages was $14 per hour. However, the hiring of. Morales was used as a justification not to hire Amador, who had worked as a painter longer than Morales. Moreover, workers from the outside were hired in May. Considering this evidence along with the evidence of antiunion animus throughout this decision and the absence of a legitimate explanation for failing to consider these former employees as well as other former employees, I find the General Counsel has met its burden.

C. Termination of Juan Silva

The General Counsel asserts, in complaint paragraph 7(c), that the Respondent unlawfully terminated welder repairman Juan Silva.

The *Wright Line* analysis set forth above applies to Silva's termination. I incorporate my findings about regarding union activity, employer knowledge, and antiunion animus. In addition, as to Silva specifically, the record shows he spoke regularly with leadmen Ishmael Lopez and Luis Lopez about the Union and told Ishmael he hoped the Union would win the election and bring about changes. It was Ishmael Lopez who observed Silva lowering the EOCC unit and reported it to Valenzuela. Accordingly the General Counsel has established the Respondent's knowledge. The General Counsel also points to the timing of Silva's discharge, which was two after the Company received the NLRB's Notice of Representation Hearing, and 2 days after the Union engaged in handbilling. I find the General Counsel has met its initial *Wright Line* burden.

The Respondent contends that Silva was fired because he committed a serious safety violation when he failed to properly discharge an EOCC unit. This violation, the Respondent asserts, was all the more egregious given that a similar violation

[61] Maciel also testified that Chavira never took an application, but this is clearly erroneous.

[62] Lave's comments on his rehire summary state "see below" but there are no comments for Ricardo Martinez. (GC Exh. 63.)

had occurred the day before and the employees had received additional training as a result. Moreover, the Respondent claims that Silva's conduct was exacerbated by his insubordination to Vasquez by questioning the proper procedures for discharging the EOCC unit.

The General Counsel claims the Respondent's stated reasons for terminating Silva are pretext to mask retaliation. First, the General Counsel points out that Scaggs and Maldonado, who committed the same infraction, were not fired. I agree the evidence shows that these two comparative employees engaged in similar conduct yet received less harsh treatment. With regard to Scaggs, who was working with Silva, the Respondent admits that EOCC units are removed using teams of two employees, and both employees equally responsible to ensure all safety procedures are followed. Yet Scaggs received a suspension, and Silva was terminated. Indeed, there is evidence that Scaggs had a greater role in the May 30 incident, as he had left a forklift unattended. The Respondent contends that Scaggs and Silva were in the same protected category in that both had signed authorization cards, so the harsher treatment of Silva could not be based on his union activity. There is no evidence, however, that Scaggs discussed his support for the Union with any supervisors, as Silva did. [63] The Respondent also points out that Silva was not laid off and that this casts doubt on the veracity of his testimony about his discussions with Lopez[64] and shows that Union activity did not play a role in his termination. Admittedly, however, leadmen and other supervisors were not consulted about the layoffs, and learned about them when everyone else did. In the case of Silva's termination, Lopez was directly involved in reporting the incident.

With regard to Maldonado, the Respondent contends he was given a warning because he only failed to comply with one aspect of the procedure, whereas Silva failed to perform all of the required procedures. The documentation belies this, however, as Maldonado's discipline states he "failed to discharge an EEOC unit" and he also failed to strap the unit. Moreover, the same potential safety hazards were noted for both Silva and Maldonado's violations.

In addition, the General Counsel contends the Respondent offered shifting reasons for terminating Silva, noting that his discharge documentation states he was fired for "safety"; the box labeled "insubordination" is not checked and there is nothing discussing insubordination in the narrative portion. At the hearing, however, Valenzuela added that Silva was also terminated for his insubordination because he stayed behind after a safety training and expressed disagreement with the procedures as Vasquez described them. According to Vasquez, however, Silva wanted to know why they weren't strapping the EOCC when it was being brought back up to the unit because he believed the same risk was involved as when it was being lowered. When Vasquez explained the reasons to him and reiterated that regardless of whether or not he agreed with the reasons, the instructions were to be followed, he was satisfied that Silva understood. Given this factual scenario, any claim that insubordination played a role in Silva's termination is suspect, and its after-the-fact appearance as a justification renders it more so. I find it is evidence of pretext. See *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

The Respondent notes that Silva received a 1-needs improvement for safety on his most recent performance appraisal. This is true, but it does not explain why progressive discipline applied to other employees was not applied to Silva. Accordingly, I find the termination of Silva violated Section 8(a)(3) and (1) of the Act as alleged.

Objection 4 mirrors this complaint allegation and is hereby sustained based on the reasoning above.

D. Alleged Coercive Conduct

The complaint, paragraph 5, contains multiple allegations that the Respondent violated Section 8(a)(1) through its use of threats, interrogation, surveillance, the promise and granting of benefits, and other coercive conduct.

The Board's longstanding test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co*., 124 NLRB 146 (1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). It is the General Counsel's burden to prove that a statement or conduct constitutes an unlawful threat, interrogation or act of surveillance, or an unlawful promise or grant of benefits.

1. Alleged October 2012 interrogation and impression of surveillance–Martin Torres

Paragraph 5(a) alleges that Foreman Martin Torres interrogated employee Jorge Martinez and created the impression of surveillance when, in October 2012 in the front shop, he asked him if the union was coming around again and told him there were rumors about it.

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, includ-

[63] The same explanation holds true for Maldonado, who also signed a card.

[64] The Respondent further contends that Silva falsely testified that the safety procedure at issue was presented differently at each of the training programs he attended, and that requiring a strap to be placed over the piston before taking down the unit was new. (R. Br. p. 72 fn. 77.) The trainings were conducted in English, however, and while Silva can understand some English, his first language is Spanish and it was clear at the hearing that he needed the assistance of the interpreter in order to testify.

ing those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. The Board also considers whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997). These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, 269 NLRB at 1178 fn. 20.

Turning to the first factor, the Respondent has a history of hostility toward union organizing, as shown by its campaign to defeat the UTU in 2011, as well as evidence regarding the violations found herein. The second factor does not weigh in favor of finding a violation, as there is no evidence Torres intended to take any action against J. Martinez. The third factor weighs in favor of finding a violation, as Torres was a Foreman with supervisory authority over J. Martinez. The place and method of interrogation also support a violation, given that the conversation took place in the front shop while J. Martinez was performing work, and was not part of a back-and-forth casual conversation . As to the fifth factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005). J. Martinez's statement that he did not know if the union was coming back around, despite the fact that he was one of the lead employee organizers, support a finding of unlawful interrogation. Based on the foregoing, I find the General Counsel has met its burden to prove that Torres interrogated J. Martinez as alleged.

The test for whether an employer's statement creates an impression of surveillance is whether the employee would reasonably assume from the statement that her union activities were under surveillance. *United Charter Service*, 306 NLRB 150 (1992). The Board has held that a supervisor does not create an impression of surveillance by a mere statement that he is aware of a rumor about union activities "so long as there is no evidence indicating that the respondent could only have learned of the rumor through surveillance." *South Shore Hospital*, 229 NLRB 363 (1977), citing *G. C. Murphy Co.*, 217 NLRB 34, 36 (1975). "Since a rumor is, by definition, talk or opinion widely disseminated with no discernible source, employees could not reasonably assume from a respondent's knowledge of such a rumor, without more, that their union activities had been placed under surveillance." Id.

The General Counsel cites to case law where the employer conveys to the employee that he knows about, or suspects, the employee's specific union activity. Here, Torres' isolated comment does not convey such a message. He was not among the orchestrators of the antiunion campaign, and it is unknown whether he supported the Union, opposed it, or was neutral.

2. Alleged promise or grant of benefits

The Supreme Court, in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), stated that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." As the Court explained in *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

(Footnote omitted.) It held that that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. The rule applies both when an election is imminent as well as during an organizational campaign before a representation petition has been filed. See, e.g., *Curwood Inc*., 339 NLRB 1137, 1147–1148 (2003) enfd. in pertinent part 397 F.3d 548, 553–554 (7th Cir. 2005) (prepetition announcement and promise to improve pension benefits in reaction to knowledge of union activity among its employees violated Section 8(a)(1).

To avoid liability, an employer that grants wage increases or other benefits during the pendency on an election petition must prove that the increase or benefit was planned prior to the time the union activity began, or that they were part of an established past practice. *NLRB v. Exchange Parts Co.*, supra; *Baltimore Catering Co*., 148 NLRB 970 (1964). If the announcement of a benefit is timed to influence an election's outcome, the Board may find a violation of the Act even where the benefit had previously been planned.

a. November 2012 erasure of attendance points

Paragraph 5(b) and (c) of the complaint alleges that the Respondent unlawfully promised to erase accumulated attendance points, and then acted on that promise by zeroing out employees' attendance points in November 2012 in order to dissuade support for the Union.

I find the timing of the attendance point rollback, on the heels of the mass layoff and the day they Respondent was served with the petition for election, is highly suspect. See *Vemco, Inc.*, 304 NLRB 911, 930 (1991). Maxey claimed she performed the audit leading her to find problems with the attendance points on November 12–14, after assuming Madrigal's responsibilities following her termination. Madrigal recalled Maxey performed an audit of the employees' attendance points shortly after Maxey began working for GRS in April 2012, and that, as a result, about five or six employees had their attendance adjusted. (Tr. 393, 453.) This is consistent with Stewart's recollection that in the spring of 2012, he and Maxey learned of attendance point discrepancies. Even if Maxey did a second audit in November, there was no cogent explanation as

to why the errors were not corrected for individual employees as they were in the spring.[65]

The Respondent contends that the November audit occurred without Ms. Maxey's awareness of an organizing campaign. It is clear, however, that employees during the November 12 layoff meeting spoke about the Union, and J. Martinez stated, "You can have this down for sure. That this Monday, there's going to be a petition for a Union vote." Maxey and Maciel, who speaks Spanish, and decided along with Maxey to erase the attendance points, were at the layoff meeting when J. Martinez made these comments. Maciel's testimony that he did not know about any attempts to organize until about a week after the layoffs, and Maxey's testimony that she did not know about any union activity until the election petition was served cannot withstand scrutiny, and simply lack credence. The Respondent's argument on this point thus fails.

Accordingly, I find the erasure of attendance points for all remaining employees following the mass layoff was intended to coerce employees in violation of Section 8(a)(1).

b. December 2012 CEO bonus

The General Counsel offers no argument in support of its allegation, in complaint paragraph 5(d), that the Respondent granted employees a CEO bonus in order to dissuade their support for the Union. As the CEO bonus was paid companywide basis from GRS' parent company, and there is no evidence it was implemented in anything other than normal business fashion, I agree with the Respondent that this allegation should be dismissed. See *Stanley Smith Security*, 270 NLRB 225 (1984).

c. January 2013 pay increase

Paragraph 5(e) and (f) of the complaint asserts that the Respondent announced, through a notice on its bulletin board, and then implemented an increased maximum hourly rate for its employees in or around February 2013.

The General Counsel presented no evidence that Valenzuela posted a notice on a bulletin board informing employees about a wage increase, and therefore I recommend dismissal of complaint allegation 5(e).

The Respondent admitted it raised the maximum hourly cap for employees in or around February 2013. The raise took effect in January, which was consistent with past practice. The change was that the Respondent decided to no longer make the raise retroactive to September 1, the beginning of the fiscal year, but instead have it begin effective January 1, to avoid the requirement of making retroactive calculations. Thus, the pay raise was not unusual, but its timing changed, and to pay employees the raise for September 1 through December 31, eligible employees received a one-time lump sum of $350. (R Exhs. 90–92.)

The evidence shows that the bonus was paid each year. Whether the change in timing with the lump-sum bridge represented a benefit or was a loss for the employees at the top of their pay scale in Tucson is unknown. Moreover, the change was implemented and the lump sum paid to roughly 200 employees at about 25 GRS facilities. See *Town & Country Supermarkets*, 244 NLRB 303, 309 (1979) (No violation where wage increase included 13 other employees at five other stores where there was no union activity.) Accordingly, I find the General Counsel has failed to prove these actions were coercive, and I recommend dismissal of complaint allegation 5(f).

Objection 5 mirrors this complaint allegation and is overruled based on the reasoning above.

d. May 2013 safety program

Complaint allegation 5(g) alleges that in about February or March 2013, the Respondent implemented a safety committee and raffle for employees to dissuade them from supporting the Union.

In May 2013, the Respondent implemented Operation Safety 2013 to address Tucson's relatively poor safety record. Torra had asked Valenzuela to fix the safety situation because Tucson had the highest incident rate in the country. A May 13 safety action plan made some changes to the format of the Monday safety meetings and set forth specific training and hazard prioritization. It also announced "Poker for Safety," described above, where employees could win prizes.

The General Counsel asserts that the Respondent has offered no legitimate reason for the timing of this program. I disagree, and note that there had been a large number of safety incidents that Vasquez was concerned about and charged with fixing. This does not end the inquiry, however, because even with this justification, the timing is nonetheless concerning. As the court explained in *NLRB v. Pandel-Bradford*, 520 F.2d 275, 280 (1st Cir. 1975):

> The Board has long required employers to justify the timing of benefits conferred while an election is actually pending. Justifying the timing is different from merely justifying the benefits generally. Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice.

Unlike the change to the timing of the increase to capped employees' wages and the year-end bonus, safety poker was implemented only at the Tucson shop. It was the first program of its kind, was implemented less than 2 months before the election, and despite its success it ended after the election and was not replaced with a similar incentive program. Considering the totality of the evidence, I find the General Counsel has met its burden to prove the safety poker was implemented to dissuade support for the Union.[66]

Objection 6 mirrors this complaint allegation and is sustained based on the reasoning above.

e. May 2013 employee survey

Paragraph 5(h) of the complaint alleges that around March 2013, the Respondent solicited employee complaints and grievances, and thereby promised increased benefits and improved

[65] In the captive audience speech shortly before the election, Lave reminded employees of the attendance point audit and rollback of attendance points, noting that with a union he might lose the flexibility to fix problems like the attendance point errors.

[66] The General Counsel does not argue that other parts of the safety program were coercive, and I specifically find the safety poker was the only violation borne out of Operation Safety 2013.

terms and condition of employment if the employees refrained from organizational activity.[67]

Employer solicitation of employee grievances or complaints during an organizing campaign may be considered as an implied promise to resolve complaints elicited favorably for the employees. See *Alamo Rent-A-Car*, 336 NLRB 1155 (2001). In *Majestic Star Casino, LLC*, 335 NLRB 407, 407–408 (2001), the Board, quoting *Maple Grove Health Care Center*, 330 NLRB 775 (2000), stated:

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. . . .[I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is [sic] rebuttable one.

An employer with a past practice of soliciting employee grievances may continue to do so during an organizing campaign as long as the practice remains essentially the same. *Longview Fibre Paper & Packaging, Inc*., 356 NLRB 796 (2011).

The survey, which Valenzuela told employees was intended to help him make changes and have a good work environment, was conducted in May, just weeks before the election. (Tr. 2168; R. Exh. 33.) Employees at the Tucson shop had not previously been given a written satisfaction survey, and Valenzuela had never conducted such a survey. The General Counsel has thus established that it was an implied promise to remedy employee complaints.

Citing to *Leland Stanford Jr. University*, 240 NLRB 1138 (1979), the Respondent contends that the survey was lawful because it was for a legitimate purpose, *i.e.* to help a new plant manager improve his understanding of the shop and employees, and it was undertaken at a time when an election was not imminent and the union campaign was relatively quiet. In *Leland Stanford,* however, the Board noted, that "both prior and subsequent to the distribution of the survey, there was no active campaigning on the part of either the Union or Respondents and no election was scheduled or imminent." Id. at fn. 1. In the instant case, Valenzuela had responded to the Union's handbilling at the facility in late April, and it is uncontested that the Union continued these efforts into May. Also in *Leland Stanford*, the manager who conducted the survey had conducted similar surveys as a management consultant at a number of other medical facilities. Valenzuela had never conducted such a survey. Moreover, in *Leland Stanford*, the "elections had been dormant for almost two years and could reasonably be expected to remain so for at least another year." I find, therefore, that reliance on that case is misplaced.

The Respondent also points to a "robust history of employee communication" at the Monday safety meetings and at meetings with the regional manager or general manager. The fact remains, however, that employees had never been given a written satisfaction survey, and therefore it was not essentially the same as past practice because the "manner and method of soliciting grievances" was different. *Longview Fibre Paper & Packaging*, supra.

Based on the foregoing, I find the survey constituted an implied promise and violated Section 8(a)(1).

3. Alleged surveillance of April 2013 union activities

At paragraph 5(i), the complaint alleges that on or about April 23, Valenzuela engaged in surveillance when he followed Union representatives as they distributed flyers to employees arriving to work.

As set forth above, the test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB,* 682 F.2d 98 (3d Cir. 1982)). The Board has consistently held that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. See *Fred'k Wallace & Son, Inc*., 331 NLRB 914, 915 (2000). For example, in *Metal Industries*, 251 NLRB 1523, 1523 (1980), the Board found no unlawful surveillance of employees where the employer had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the workday because the employer's observance of the employees' Section 7 activity was inseparable from its regular and noncoercive practice. See also *Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003).

Employers may not, however, "do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Loudon Steel, Inc*., 340 NLRB 307, 313 (2003); see also *Partylite Worldwide, Inc*., 344 NLRB 1342 (2005); *Arrow Automotive Industries,* 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007). The Board's analysis thus focuses on whether the observations were ordinary or represented unusual behavior. *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008). Even unusual observation or enhanced surveillance will not violate the Act, however, where the employer shows it was instituted for legitimate reasons, such as security. *Lechmere, Inc.*, 295 NLRB 92 (1989); enfd. 914 F.2d 313 (1st Cir. 1990), revd. on other grounds 502 U.S. 527 (1992).

It is undisputed that Valenzuela went to the entrance of the Tucson facility when he was alerted about the union activity taking place there, that Valdez accompanied him, and that

[67] The complaint alleges that the survey was conducted by Vasquez and C. Martinez. They both had input into the survey and helped administer it, but Valenzuela was also involved, and his involvement was fully litigated so I therefore consider it. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Vasquez joined them when he arrived for work. None of those individuals was normally out greeting employees in the parking lot. As the Respondent notes, however, Valenzuela was responding to an employee telling him there were people on the property and he almost ran them over. Valenzuela's testimony in this regard is unrefuted.[68]

As the Respondent points out, an employer may lawfully bar non-employee union organizers from its property. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The evidence establishes that Sudyam and Molina had parked their vehicle on GRS property and were handing out the lunchboxes on the GRS property. Valenzuela told them they were trespassing and told them to leave GRS property, as was his right to do. Vasquez, the safety manager, inquired about safety vests because it was dark and hard to see. When Sudyam and Molina moved their cars and moved off GRS property, Valenzuela, Valdez, and Vasquez went back inside. The fact that Sudyam and Molina moved their cars is strong evidence that they were initially on GRS property. Though the record contains numerous photographs of the property and witnesses were asked to describe where they stood, I did not find this evidence very helpful because the handbilling was not a stationary event and the vantage point of the property line demarcations is different looking at a picture after the fact than it is standing on the ground in the moment.

The Respondent points to *Hoschton Garment Co.,* 279 NLRB 565, 567 (1986), where the Board held that an employer acting lawfully in attempting to evict trespassers does not act unlawfully by observing their trespassory activities. It is undisputed that once the organizers left the property, the managers went inside, and that future handbilling occurred without incident. Because the only observation of handbilling by any manager who was engaged in anything other than usual activity took place while Sudyam and Molina were on GRS property, I find it was not unlawful.[69]

Objection 7 mirrors this complaint allegation and is overruled based on the above reasoning. Objection 8 asserts that GRS created the impression employees' activities were under constant surveillance. Based on the analysis of surveillance in this section and the allegation related to Torres and J. Martinez, Objection 8 is likewise overruled.

4. Alleged threats and denigration

The complaint alleges, at paragraph 5(j)–(o), that through a series of speeches and flyers, the Respondent threatened employees that selecting the Union would be futile and would result in plant closure and loss of the right to bring complaints directly to management.

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire & Auto. Testing of Tex.*, 308 NLRB 72 (1992). The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

Determining whether a statement is an illegal threat of plant closure or other harm as opposed to an opinion about the possible consequences of unionization has proven difficult. It must be assessed in a fact-specific manner, taking into account the employer's right to freedom of speech under Section 8(c) of the Act, balanced against the employees' right to be free from coercive threats under Section 7. The leading case on this subject is *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1968), where Supreme Court addressed this tension, stating:

> It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

See also *National Propane Partners, L.P.*, 337 NLRB 1006, 1017 (2002). An employer need not remain neutral during a union campaign, and Section 8(c) permits the employer to campaign against the union and present an alternate view, ensuring employees are fully informed about their choice. See, e.g., *Steam Press Holdings, Inc. v. Hawaii Teamsters*, 302 F.3d 998 (9th Cir. 2002). However, employers must present their view without threatening employees. As the Court noted in *Gissel*, 395 U.S. at 619–620, "the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." (Footnotes omitted.)

The Respondent contends that its speeches and flyers were protected by Section 8(c), while the General Counsel contends that the Respondent crossed the line and intruded on employees' Section 7 rights. I find some of the Respondent's statements were unlawful threats. In reaching this conclusion, I consider the entirety of the statements, some of which were clearly within the bounds of 8(c)'s protections, and others of which were clearly not. The volume is not the focus. Instead, I am looking at what the various messages, all of which were delivered to employees in June and July, together conveyed to employees.[70]

[68] I do not accept the hearsay testimony about what Hardenbrook said as establishing the truth of the matter asserted, but instead consider it for purposes of establishing Valenzuela's state of mind.

[69] I also find that there was, at least at the outset, a legitimate safety concern, and Vasquez' interactions with the organizers was focused on that concern.

[70] I have reviewed the various cases cited in the Respondent's brief addressing whether various statements, oral or written, cross the line

In a series of handouts described fully in the statement of facts, GRS management gave employees a steady dose of its antiunion sentiment. Some of the messages the flyers conveyed were: Negotiations can take a long time and may not result in a contract; The Union's best leverage to gain favorable terms in negotiating the contract is to strike; If there is a strike workers can be replaced and production shifted to other facilities; Unions act in their own self interests and may cause employees to give up wages or benefits; Unions generally negotiate a common rate for everyone in the same job resulting in less pay for higher paid workers; The SMW will cost employees a lot of money in dues, fines and assessments; Employees should not throw their money down the drain by bringing in a union; A union will result in less overtime for employees; Employees are basically without recourse if a union doesn't treat them fairly; Even though nonmembers cannot be fined for working during a strike, unions do it anyway; The SMW can put its members on trial and penalize them if they are found guilty; Once a contract is negotiated, employees are stuck with the union until the contract expires, and it is hard to get rid of the union; Employees' individual voices will be "drowned out by the voice of the Union"; and SMW officials cannot be trusted.

At the meetings, both Lave and Torra emphasized that GRS was in a very precarious financial situation, and a union adds unnecessary costs. Lave discussed the closure of some other GRS plants, and stated if "the union comes in, that could possibly slow down our progress we're making. And this critical time for us, we are needing to get more profitable here, so the parent company allows us to keep Tucson open." He told employees Tucson was one of six shops on a watch list, that the shop was headed in the right direction, and conveyed that the if the union was voted in the momentum would be "shattered" because "we're going to have to deal with contract negotiations and all the other disruptions a union will bring in here." He told employees the CEO announced to the shareholders that eight shops were being closed down; Lave had already closed four, and was tired of closing shops. He did not want the union to come and cause things to go the other way after all the hard work employees had put in to turn the shop around.

Torra and Lave discussed how a union contract sets firm rules from which employees and management cannot vary and it prevents employees from going directly to management. Torra explained that he had overseen both union and nonunion facilities at the same time and thought the nonunion facilities were better run, with better communication and better compensation packages than the union facilities. He also untruthfully stated, "Our number 1 customer, who's TTX, either rightfully or wrongfully is adverse to unions. That's why they shop cars with us because they recognize us as a nonunion facility. So the risk I see, what will happen with our number 1 customer?"

Lave expressed his frustration over the union filing a lawsuit about the attendance audit, adding that GRS was paying an attorney $400 per hour to defend against it. He expressed exasperation that at a time when they were trying to make the plant more profitable, he had to spend money to defend against this even though he thought the attendance rollback was fair. He separately expressed frustration about other unfair labor practice charges, bemoaning the $400-an-hour attorney fees he had to spend at a critical time when they were trying to make the shop more profitable.

Lave mentioned that the union, by Federal law, has the right to choose which disputes and grievances to address with management, offered his opinion that this was not fair or right, and stating that in his prior law practice he could not help employees sue their employer or union if an employee thought the union treated them unfairly.

Turning to whether the Respondent threatened employees with closure of the plant, I find that it did. Here, as in *Gissel*, the Respondent's speeches and flyers conveyed the message that the company's financial position was precarious; a strike was the best way for the Union to exercise its leverage and obtain its contract demands; and bringing in the Union would likely cause the plant to shut down. The message here was compounded by Lave discussing all the money they were wasting defending ridiculous unfair labor practice charges (some of which I have found meritorious), at a critical time for the plant, and expressing concerns that the Union would sabotage positive momentum around at a time when Tucson was on the watch list for potential closure. Notably, and falsely, employees were threatened with loss of their biggest customer, and by implication plant closure, by Torra's comments that TTX does not like to do business with unions and only shops cars at the Tucson facility because it is non-union. TTX executive Harmsworth expressly and soundly contradicted this, testifying that TTX has a strong and positive relationship with the Brotherhood of Railroad Carmen, which represents over 600 of its employees, and does not prefer to do business with nonunion customers. (Tr. 2682.) Clearly this comment was not "carefully phrased on the basis of objective fact" but instead, along with other comments insinuating likely plant closure if the Union was elected, was made to threaten employees with loss of their jobs.[71]

In a similar case, *Kolmar Laboratories, Inc.*, 159 NLRB 805 (1966), the Board found the employer violated Section 8(a)(1) where, in a series of communications to employees, it conveyed that the plant was in a financially precarious position, any further restrictions the plant's efficient operation would be detrimental, and selecting the Union would cause such restrictions resulting in loss of job security. Here, as in *Kolmar*, the barrage of messages was capped off by captive-audience speeches from high-level officials who were not frequently on site.

The General Counsel points to language in "Greenbrier Rail Services Facts Matter" flyer stating, in bold capital letters at the bottom, "DON'T SUBJECT YOUR FAMILY AND YOUR FUTURE TO THE RISKS OF COLLECTIVE BARGAINING. VOTE NO!" as threatening harm. Citing to *Hasbro Industries*, 254 NLRB 587, 592 (1981), enfd. in pertinent par, *NLRB v. Hasbro Industries*, 672 F.2d 978, 983 (1st Cir. 1982), the General Counsel argues that amidst a "barrage" of other coercive

from protected speech to threat. I note that in those cases, as here, the analysis is dependent on the context, including the presence or absence of other statements or actions.

[71] Objections 1 and 2 mirror these complaint allegations and are sustained.

statements, this languages is a threat that they could only be harmed if the Union and the Respondent negotiated. Standing alone, I do not find this statement to be a threat. Considering it along with statements about loss of customers and threats of plant closure, however, I find it was threatening.

The Respondent contends that statements such as "unions add extra costs toward business" are common in an election campaign and have not been deemed unlawful. While this is true, the Board has also found that tying these statements to plant closure, as was done here, crosses the line. *Kolmar,* supra. In a seeming attempt to justify Torra's false statements about TTX preferring to work with non-union customers, the Respondent points to *Curwood, Inc*., 339 NLRB 1137 (2003), enfd in pertinent part 397 F.3d 548, 553–554 (7th Cir. 2005), to argue that statements about potential loss of customers are lawful. In *Curwood,* however, the company provided "objective material reflecting its customers' concerns." Such evidence is not merely absent from the record here, its existence is belied by Harmsworth's testimony. The Respondent cites also to *Tri-Cast, Inc*., 274 NLRB 377 (1985), finding no violation when the employer made the reasonable possibility known to employees that "higher bids or customers feelings of dissatisfaction due to problems caused by union strikes can lead to lost business and lost jobs." Be that as it may, what was conveyed regarding potential loss was specifically about one customer, TTX, and it was false.[72] Accordingly, I find these arguments unpersuasive.

The General Counsel also argues that language in the handout "Greenbrier Gives You the Facts . . . ABOUT GOOD FAITH BARGAINING" communicates the Union's futility. The specific language states:

> Because negotiating a first contract between a newly elected union and the employer means starting with a "fresh sheet of paper" and negotiating every term of the contract, rather than negotiating changes to an existing contract, a first contract often takes several months to negotiate even if the parties reach agreement.

The Board has frequently considered similar statements in the past, and found they are not a *per se* violation of the Act. In *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980), enfd. mem. 679 F.2d 900 (9th Cir. 1982), stated:

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

In *Coach & Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977), the Board emphasized that such statements must be read in context, noting that the "presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks."

At the June 28 meeting, in response to an employee's question, Lave stated, "if a union comes in Mike, and Eric and I, we're going to sit down with the Union at a table, and we're going to bargain for the wages and the benefits. We will bargain in good faith." He followed it by stating, "But if the Union doesn't like what's happening with the bargaining, with the negotiating, they can call a strike. And we can lock them out." Under the circumstances present here, I find the "fresh sheet of paper" comment would reasonably "be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore" and therefore violates Section 8(a)(1). *Taylor-Dunn*, supra

The General Counsel also contends that the Respondent denigrated the Union. "Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Sears, Roebuck & Co*., 305 NLRB 193 (1991). An employer, however, may violate the Act when it denigrates the Union in the eyes of employees. See *Lehigh Lumber Co*., 230 NLRB 1122 (1977). The employer's freedom under Section 8(c) to disparage, criticize, or denigrate the Union stops when the comments threaten employees or otherwise impinge upon Section 7 rights. *Children's Center for Behavioral Development*, 347 NLRB 35 (2006). As already discussed, Lave repeatedly disparaged the Union by discussing the large sums of money the Union was costing them to defend against lawsuits he conveyed as baseless. Where, as here, denigrating comments were very clearly tied to the precarious financial situation of the Tucson shop and threats of closure, I find they violated the Act.

Turning to allegations that the Respondent threatened that employees would no longer be able to bring complaints directly to management if they selected a Union, the General Counsel relies on *Associated Roofing Co*., 255 NLRB 1349 (1981). As acknowledged, however, this decision was overruled. *Tri-Cast, Inc*., 274 NLRB 377 (1985). See also *Office Depot*, 330 NLRB 640, 642 (2000). Accordingly I recommend dismissal of complaint paragraph subsections 5(j)(2), (k)(3), and (m).

E. Objections to Elections

Objections 1–8 are addressed above in the respective sections discussing the complaint allegations with which they align.

Objection 9 asserts that the GRS management, during the critical period, disciplined and isolated prounion employees to coerce other employees and to prevent the prounion employees from participating in protected union solicitation activities. The termination of Silva is discussed above and is the subject of Objection 4. As no evidence of other discipline or isolation was adduced at the hearing, this objection is overruled.

Objection 10 asserts that GRS provided an inaccurate Excelsior list that did not use dates from the stipulated agreement on

[72] The Respondent's reliance on *TNT Logistics North America, Inc*., 345 NLRB 290 (2005), is misplaced under the same reasoning.

June 3, 2013. The record does not contain evidence sufficient to substantiate this, so this objection is overruled.

Objection 11 asserts that during the election, management was approximately 70 feet away from the polling location. Sudyam observed Valenzuela and another person standing roughly 70 feet away from the polls in a place where the employees would have to walk past them to vote. Sudyam did not observe any employees walking past Valenzuela. (Tr. 1864–1865.)

The Board has found that management's presence at a polling cite may violate the Act by interfering with the employees' free choice. In *Belk's Department Store of Savannah, Ga., Inc.*, 98 NLRB 280 (1952), polling occurred in a warehouse accessed by the store's rear door. Employees waiting to vote gathered near the rear door, which was about 35 feet from the warehouse. The Board found that a manager who walked back and forth between the rear door and the warehouse 70–80 percent of the time polling was taking place, and at least twice walked through the group of employees waiting to vote, interfered with employees' free choice. In *Performance Measurements Co*., 148 NLRB 1657 (1964), the company's president stood by the door to the election area at each plant, requiring employees to pass within two feet of him to gain access to the polls, and for a period of time he was sitting at a table six feet from the doorway to the polling place. The Board found this interfered with employees' free choice.

In the instant case, Sudyam testified that Valenzuela and an unidentified man were roughly 70 feet from the polling place. He did not see any employees in close proximity to them, and did not see any employees walk past them. I find there is insufficient evidence that the presence of Valenzuela and the other person roughly 70 feet away from the polling location interfered with employees' free choice, so this objection is therefore overruled.

Objection 12 asserts that a known supervisor was permitted to vote after polls had closed. Miguel Solomon[73] cast his ballot subject to challenge after the polls had closed on the advice of the NLRB agent. (Tr. 1867–1868.) Sudyam thought he was a supervisor based on what Ramos, who last worked at GRS in November 2012, told him. The record does not contain evidence sufficient to substantiate this objection, so it is therefore overruled.

Objection 13 states that the Respondent, during the critical period, intimidated union supporters in a manner so egregious that an election observer could not be secured from the eligible voter list. The hearing record contains uncontroverted testimony that the individuals who agreed to be the Union's primary and secondary observers at the election ultimately declined to fulfill those roles. The record further establishes that one of the employees who agreed to be an observer declined at the last minute for fear of retribution. Although the testimony on this point was hearsay, I find it reliable based on other evidence of record, including the evidence of antiunion animus, and the fact that a non-employee, Ramos, stepped in to be the Union's observer.[74] Accordingly, this objection is sustained.

F. Plant Closure

The complaint alleges, at paragraph 5(t)–(v), that the Respondent decided to close the Tucson facility in August or early September 2013, issued WARN Act notices to employees on September 5, 2013, and closed the facility on November 4, 2013, in violation of Section 8(a)(1), (3) and (4) of the Act.[75]

The analytical framework set forth in *Wright Line*, articulated above in the section discussing the layoffs, applies in mixed-motive cases involving closure of a facility and relocation of work. See *Central Transport,* 306 NLRB 166 (1992), enfd. in relevant part and modified 997 F.2d 1180 (7th Cir. 1993); *Nu-Skin International*, 320 NLRB 385 (1995). I incorporate my findings from that section regarding Union activity, the employer's knowledge of it, and animus. By the time the decision to close the plant occurred, there was additional Union activity, additional unfair labor practice charges had been filed, the Respondent had received the Notice of Representation Hearing petition, the election had occurred, and objections had been lodged. The evidence of union animus by this time was more apparent and pronounced, as shown by the conduct, some of which rose to the level of unfair labor practice violations, described above. The General Counsel has easily met its initial burden under *Wright Line,* and the burden of persuasion has shifted to the Respondent to prove it would have taken the same action even in the absence of the protected conduct.

The Respondent contends that the Tucson plant closure was the result of an independent decision of its primary customer, TTX, to stop sending cars to Tucson. Starting in mid-May, following a meeting with TTX and a visit to TTX's Acorn facility in Jacksonville, GRS executives began revising their strategy to make Tucson, San Antonio, and some other underperforming shops more profitable. During a mid-June meeting with TTX and GRS executives, they discussed a revised plan to have Tucson and San Antonio as dedicated TTX facilities. At TTX's request, they prepared a chart with assumptions based on different hours of work TTX would be supplying. The menu GRS laid out increased the hourly rate at Tucson by about 18 percent if the workflow was left as it was, but decreased the rate by consolidating all the work at Tucson. TTX did not have the volume to support the higher volume/lower rate option, to GRS' surprise.[76]

The meetings had prompted TTX to re-examine their logistics, and TTX decided routing railcars to Tucson did not make the most sense. TTX also deemed San Antonio to be an important facility because of its location in Texas, where its largest customer, Union Pacific, routes many of their cars.

[73] The objections state the known supervisor was Miguel Sepulveda, but the testimony was Miguel Solomon.

[74] It is understandable that the same employee who declined to be the observer for fear of retribution would not want to testify on this point.

[75] Par. 5(w) alleges that unknown employees were laid off between September 6 and November 7, 2013, but evidence was not presented to prove this assertion. I therefore recommend dismissal of this allegation.

[76] Billed hours for TTX were roughly the same in 2011, 2012, and 2013. (Tr. 2538; GC Exh. 275.)

The General Counsel argues this is pretext, as there was no "discount" offered to TTX to keep cars in Tucson, just a dramatic price increase. While this is true if the volume of work in Tucson remained the same, Tucson came out ahead of its prior rate if TTX continued to send the current level of work there and some of the work that had been sent to San Antonio. If San Antonio was closed, this volume was reasonable based on recent history, particularly considering it would cost TTX less to send its bad-ordered cars from California to Tucson than San Antonio.[77] Moreover, similar rate increase was proposed to the primary customer for the GRS facility in Corwith, Illinois, where no union activity existed. In response to a 20 percent proposed rate increase to the customer, which the customer rejected, the Corwith facility was closed in January 2014. Finally, the General Counsel's contention that there was no explanation offered for the rate increase is not accurate. The evidence shows the proposed conversion of both San Antonio and Tucson to TTX-dedicated plants would result in different capacity utilization at each facility. (GC Exh. 257; R. Exh. 69.)

The General Counsel further contends that the Respondent's attempt to deflect the blame for the rate increase in Tucson onto TTX does not withstand scrutiny in light of Harmsworth's statement that Glenn appreciated TTX finding a solution that enabled GRS to close Tucson. Harmsworth addressed this comment at the hearing, stating that Glenn appreciated a solution, as he had made it very clear GRS needed to fix, sell, or close Tucson, San Antonio, and other facilities due to Wall Street pressure. He never indicated a preference to her regarding which shop(s) he wanted closed. I found Harmsworth to be a credible based both on her forthright and matter-of-fact demeanor as well as the fact that she is a disinterested witness.

The timing of changing Tucson from a "fix" to a "close" shop is also cited by the General Counsel to support an argument that the "Respondent was concerned about what might occur if the July election was set aside, and another election was ordered –or if employees simply continued to organize and try for a third election next year." The timing argument cuts both ways. After the initial failed election in 2011, the Tucson shop was not slated for closure based on fears of another election or continued legal costs, nor was it slated for closure when the Respondent learned organizing efforts had rekindled in the fall of 2012. Moreover, the pricing menu for TTX work that the General Counsel claims is evidence of unlawful motive was not generated and given to TTX until after the election. As of July 24, Abel was still trying to come up with ideas to lower the costs of running the Tucson shop in order to facilitate TTX's business needs. (R. Exh. 69.)

Once TTX decided not to send cars to Tucson anymore, the General Counsel argues that the Respondent's decision to close the shop was pretextual, as evidenced by its lack of efforts to find other customers for the facility or increase the volume of work from its existing customers. The evidence shows, however, that fixing, selling, or closing some shops was part of a much larger plan to increase profits and meet Wall Street demands in the wake of a hostile takeover attempt.[78] The planning never included continuing to run the Tucson shop without its largest customer sending cars there for repair. I find, therefore, that the decision to close the shop, in light of the circumstances, was motivated by more global concerns rather than fear of a rerun election or another organizing drive in Tucson.

G. Bargaining Order

The General Counsel has requested a remedial bargaining order pursuant to *Gissel*, supra. Though such a remedy is extraordinary, I find the General Counsel has met its burden to prove it is appropriate under the circumstances present here.[79]

The purpose of a remedial bargaining order is "to remedy past election damage [and] deter future misconduct." *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). The Supreme Court had sanctioned the issuance of such a bargaining order "where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined the union's majority. . . ." *Gissel*, 395 U.S. at 610, 89 S.Ct. 1918; see *NLRB v. Katz*, 369 U.S. 736, 748, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). The Board thus has the authority to order an employer to recognize and bargain with a union even if the employees have not voted for union representation in an election.

The Ninth Circuit, in *Scott ex rel. NLRB v. Stephen Dunn & Associates*, 241 F.3d 652 (9th Cir. 2001), described the limited circumstances under which a bargaining order is appropriate:

> First, when an employer has engaged in such outrageous and pervasive unfair labor practices that a fair and reliable election can't be held, the Board may order bargaining even absent a showing of majority support for the Union
>
> . . .
>
> Second, the Board may order bargaining when the Union shows that it once had a majority and that its support was undermined by unfair practices that impede[d] the election process
>
> . . .
>
> [The Board] must show both that the Union secured the support of a majority of [the] employees and that [the employer] subsequently engaged in unfair labor practices that undermined the Union's majority and impeded the election process.

The former type of case is referred to as a "Category I" case and the latter a "Category II" case. See *Register Guard*, 344 NLRB 1142, 1146 (2005).

As to Category I, the pervasiveness of the unfair labor practices is described fully above and need not be reiterated here. The unfair labor practices included highly coercive hallmark violations such as a mass layoff of roughly one-third of the production workers, threats of job loss and plant closure, and an unlawful termination. See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980); *General Fabrications Corp*., 328

[77] Mileage costs average about 70 cents per mile, and Tucson is closer to Southern California than San Antonio. (Tr. 2647.)

[78] The fact that the Tucson shop was making some money in the summer of 2013 and could have had earnings even without TTX oversimplifies matters for a publicly-traded company.

[79] I find Objection 14 covers the same alleged conduct that supports the bargaining order, and therefore I sustain it.

NLRB 1114, 1116 fn. 17 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). These threats and other actions came from very high levels of management and resulted in a significant erosion of union support, as discussed more fully below. The unfair labor practices continued over several months, and were committed both by high-level managers as well as lower level supervisors. The threat of plant closure came from high level officials during captive-audience meetings to each and every employee. "Neither the threat nor the mass layoff is likely to be forgotten by the employees. To the contrary, these are the types of dire warnings and concrete measures certain to exert a substantial and continuing coercive impact on any employee, whether current or subsequently hired, contemplating a vote in favor of unionization." See *Weldun International*, 321 NLRB 733, 734, and 748 (1996), enfd. mem. in relevant part 165 F.3d 28 (6th Cir. 1998 . I find, therefore, that based on the severity and pervasiveness of the unfair labor practice, a bargaining order is warranted under Category I. *Electro-Voice, Inc*., 320 NLRB 1094 (1996).

This case also meets the standards for a bargaining order under Category II. The General Counsel submitted evidence of majority support for the Union in the form of at least 46 signed authorization cards.[80] The cards are unambiguous, and stated, in both English and Spanish, that the signer authorizes the Union "to represent me for purposes of Collective Bargaining, and in my behalf, to negotiate and conclude all agreements as to hours of labor, wages, and other conditions of employment." The unfair labor practices undermined the Union's support so extensively that the individual who had once agreed to be the primary observer quit at the last minute stating he feared repercussions, and the individual who agreed to be the secondary observer withdrew and ceased communicating with the Union.[81] Where the Union once had majority support, only 13 employees voted for the Union in the July election. See *Power Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1995). Based on its conduct, I find the Respondent has thoroughly undermined past and future support for the Union.

The Respondent points to *Hialeah Hospital*, 343 NLRB 391 (2004), in support of its argument that traditional remedies would be appropriate if GRS was found to have engaged in threats. I have found GRS engaged in much more than threats, however, and I note that the Board distinguished *Hialeah Hospital* from cases involving mass layoffs and discharge of one-third of the work force. Id. at 395. Reliance on *Jewish Home for the Elderly of Fairfield County*, 343 NLRB I 069 (2004), suffers from similar faults. The Respondent also cites to *Be-Lo Stores v. NLRB*, 126 F.3d 268, 281 (4th Cir. 1982), to support an argument that the General Counsel failed to prove unfair labor practices contributed to an erosion of support. In *Be-Lo*, however, it was unclear whether there was ever majority support, and a new election was deemed appropriate because 6 years had passed since the previous election and there had been substantial turnover in the work force. Clearly, the instant case turns on very different facts.

H. Failure to Bargain Allegations

The Complaint, at paragraph 7, sets forth numerous allegations of failure to bargain with the Union in violation of Section 8(a)(5) of the Act.

The National Labor Relations Act, at Section 8(a)(5), provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in Section 8(d) as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The Act does not define "terms and conditions" of employment. Regarding topics other than wages, hours, or other terms and conditions of employment, "each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Borg-Warner*, 356 US 342, 349 (1958).

First, I find the following employees of GRS are an appropriate bargaining unit (Unit) for purposes of Section 9(b) of the Act[82]:

> All full-time and regular part-time AAR write-up employees, airmen, laborers, material handlers, maintenance mechanics, painters, switchmen, and welder repairmen located at Respondent's Tucson, Arizona facility, excluding all other employees, including quality assurance inspectors, office clericals, guards, safety coordinators, plant managers, production managers, foremen, quality assurance managers, material managers, plant accounting managers, and supervisors as defined in the Act.

Having determined that the Union represented the majority of the employees in the appropriate unit as of November 8, 2012, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's demand for recognition. When the Union has obtained signed authorization cards from a majority of employees, as here, the obligation to bargain attaches when the employer embarks on a campaign of unfair labor practices. *Parts Depot, Inc.,* 332 NLRB 670, 678 (2000), enfd. 24 Fed.Appx. 1 (D.C. Cir. 2001). I find, therefore, that the duty to bargain attached no later than November 12, 2012, the date of the layoffs.[83] As such, the Respondent "is required to presently bargain, upon request, concerning any terms and conditions of employment, as to which it would have been required to bargain had the Union been recognized" when the Respondent launched its antiunion campaign. *Donn Products,* 229 NLRB 116, 117 (1977).

It is undisputed that Respondent did not bargain over the various issues presented in this case.

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[80] This majority excludes leadmen, and as set forth in the statement of facts, a majority exists whether or not the temporary workers are included.

[81] Though this testimony was provided by Sudyam, and is hearsay, I find it is corroborated by other evidence of employees being warned to stay away from the Union and is therefore reliable. See *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997), citing *Alvin J. Bart & Co.*, 236 NLRB 242, 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979).

[82] The General Counsel concedes the Unit does not include leadmen.

[83] It arguably attached when Torres interrogated J. Martinez in October, though that action is somewhat attenuated from the high-level campaign that began with the layoffs.

1. The layoffs

An economic layoff decision is a mandatory bargaining topic. See *McClain E-Z Pack, Inc*., 342 NLRB 337 (2004); *Toma Metals, Inc*., 342 NLRB 787, 787 fn. 1 (2004). Accordingly, I find the Respondent violated Section 8(a)(1) and (5) by failing to bargain with the Union about the layoffs.[84]

2. Increase in maximum hourly rate

The complaint, at paragraph 7(e), asserts that around February 2013, the Respondent increased the maximum hourly rate.

As the evidence shows, on November 27, 2012, the Respondent announced that the timing of when capped employees would receive their raises was changing. I find the raises themselves were in line with the Respondent's longstanding practice of granting capped employees an increase annually, and therefore continuing them did not require bargaining. *NLRB v. Katz,* 369 US 736, 746 (1962). The timing for calculating the raises and the payment of a one-time bridge to address the timing shift were changes, however, which required bargaining. Accordingly, I find the Respondent violated the Act by failing to bargain over the change to when raises would be calculated and implementation of the one-time bridge payment.

3. Safety committee and raffle

Complaint paragraph 7(f) alleges the Respondent violated Section 8(a)(1) and (5) by implementing a safety committee and instituting a safety raffle, and paragraph 7(g) alleges the same violation for ending the safety raffle. There was no evidence a new safety committee was implemented, and the General Counsel does not present argument on this allegation in its brief. I therefore recommend dismissal of this allegation.

The evidence shows the Respondent implemented, and later discontinued "Poker for Safety." Implementation of safety incentives and prizes is a mandatory bargaining topic. *E.I. du Pont de Nemours & Co*., 311 NLRB 893 fn. 3 (1993). Accordingly, I find failure to bargain over "Poker for Safety" violated the Act as alleged.

4. Recalls and refusals to rehire

Paragraphs 7(h) and (i) of the complaint alleges that the Respondent failed to bargain with the Union over the recalls of certain employees[85] (including the requirement to fill out an application during the recall process)[86], the failure to recall or rehire certain employees, and the discharge of Juan Silva.

Termination of a unit employee is unquestionably a mandatory subject of bargaining, even if the parties have not yet negotiated a collective-bargaining agreement. See *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991); *N.K. Parker Transport, Inc*., 332 NLRB 547, 551 (2000). "The recall of laid-off employees is . . . a bargainable matter." *Robertshaw Controls Co*., 161 NLRB 103, 108 (1966), enfd. 386 F.2d 377 (4th Cir. 1967). See also *Clements Wire*, 257 NLRB 1058, 1059 (1981) (obligation to bargain includes "manner in which any recalls are to be effected.") Accordingly, I find the Respondent violated Section 8(a)(5) and (1) of the Act as alleged by failing to bargain over the recalls, including the manner in which the recalls were to be effected, as well as Silva's discharge.

5. Closure of the Tucson shop and relocation of employees

An employer must engage in bargaining before closing down a plant and continuing the same work at a new location. *Owens-Brockway Plastic Products*, 311 NLRB 519 (1993). In *Dubuque Packing*, 303 NLRB 386, 391 (1991), the Board articulated the following test to determining whether an employer's relocation decision is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

In the instant case, the General Counsel has met its prima facie burden to establish there was no change in the basic nature of GRS' operations. GRS repaired and serviced railcars before and after the Tucson plant closure. The Respondent has not offered evidence that the work performed at the new locations is significantly different than the work performed at the former plant.

The Respondent can prevail by proving, by preponderant evidence, that labor costs were not a factor, either directly or indirectly. The evidence shows that labor rates were a primary factor driving the decision to determine which shops should close, and therefore this burden has not been met. Alternatively, the Respondent may show that the Union could not have offered labor concessions that would have changed its decision to relocate work. This has not been established, however, and any contention that the Union could have offered nothing through collective bargaining is speculation. Respondent cannot

[84] Alternatively, inasmuch as the Union requested bargaining on November 20 (received by GRS on November 21), and the layoffs are otherwise remedied, I conclude that the Company should be required to recognize and bargain, upon request, with the Union as of that date. *Trading Port, Inc.,* 219 NLRB 298, 301 (1975); *Missouri Pressed Metals, Inc.*, 237 NLRB 1398 (1978).

[85] Jesus Barnes, Jose Manuel Sepulveda, Jesus Lopez-Nuno, Jorge Martinez, Brian Perona, Juan Morales, Brian Scaggs, and Rogelio Martinez.

[86] Jesus Omar Ramos, Alex Amador, Oswaldo Chavira, Ricardo Martinez, Jesus Ruiz, Guillermo Gonzales Pico, Guillermo Murguia, Jose Angel Ortega, and Oscar Salinas.

claim to know what proposals the Union would have made regarding the changes, or what alternative solutions the give-and-take of bargaining might have generated.

Relying on *Textile Workers Union v. Darlington Mfg. Co*., 380 U.S. 263 (1965), the Respondent asserts that an employer may terminate its business without first bargaining. *Darlington*, however, concerns terminating an entire business, and GRS clearly still exists. The Respondent also cites to *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), to argue that a company does not need to bargain before deciding to close part of its business for economic reasons. *First National Maintenance,* however, applies to changes in the nature and scope of an enterprise akin to whether to be in business at all, and the Court emphasized that the decision did not apply to other types of management decisions, such as plant relocations. Id. at fn. 22. The closure of the plant here did not involve shutting down part of GRS's business or changing its scope or direction, and therefore reliance on *First National Maintenance* is misplaced. See, e.g*., San Luis Trucking, Inc.,* 352 NLRB 211, 230 (2008), enfd. 479 Fed.Appx. 743 (9th Cir. 2012).

I. Employee Handbook Provisions

Paragraph 5(p)–(s) of the complaint alleges that various provisions of the Respondent's employee handbook violate Section 8(a)(1) of the Act.

The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978).

The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, supra at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

None of the rules discussed below expressly restrict Section 7 rights, and all are analyzed under the first *Lutheran Heritage* prong, i.e., would employees reasonably construe the rule's language to restrict Section 7 activity.

1. Appearance and attire

The General Counsel alleges, at paragraph the following portion of the handbook relating to appearance and attire violates the Act:

> Regardless of the work environment, provocative slogans or images on clothing, hats, etc., and revealing or impractical attire, is not appropriate.

(GC Exh. 150, p. 19.) The General Counsel relies on *Medco Health Solutions of Las Vegas*, *Inc.,* 357 NLRB 170, 179 (2011), where the Board affirmed an administrative law judge's finding that a rule prohibiting employees from wearing apparel containing "degrading, confrontational, slanderous, insulting, or provocative" statements was overly-broad.

The term "provocative" is not defined in the rule, nor is it modified by an adverb such as "sexually," "racially" or the like. Construing the ambiguity of the term "provocative" against the Respondent, and noting the absence of language permitting employees to wear clothing or display images protected by Section 7, such as a button expressing support for or opposition to a union, I find the rule as written is overly-broad.

2. External communications

The Respondent's policy regarding external communications is set forth on page 33 of the employee handbook. It states in full:

> The manner in which GRS is perceived by its customers, business associates, the media, legislators, regulatory agencies, special interest groups and the general public is a direct result of the external communications carried out by our management and employees. These external communications have a significant impact on the Company's business and should be handled with careful consideration.
>
> GRS has appointed specific representatives to serve as information channels for news media. These representatives are responsible for approval of all press releases, responding to media inquiries, and coordinating interviews with the media—with the exception of marketing or employment related advertising—other employees should refrain from communications with the media.
>
> Please be aware that in cases of accident or emergency involving a specific employee, non management employees are prohibited from contacting the employee's family, friends of anyone involved in the emergency or accident, or the media, as such contact can cause significant confusion and undue distress. Proper communication channels have been established for designated trained employees to contact family members in case of an accident or emergency.

I find that the section prohibiting employees from communicating with the news media violates Section 8(a)(1). The Board has consistently found such rules to be an unlawful impediment on Section 7 rights. For example, in *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291–292 (1999), a policy that stated: "Questions or calls from news media should be immediately

transferred and responded to by the Marketing Department or the President of the Hotel. At no time should you talk to the media about Hotel operations" was found to be overly-broad. See also *Crowne Plaza Hotel*, 352 NLRB 382, 386 fn. 21 (2008) (Communications with news media about labor disputes are protected). The rule at issue here is similarly overly-broad, as it does not carve out an exception for communications protected by Section 7, and I therefore find it violates Section 8(a)(1).

3. Solicitation and distribution policy

Page 34 of the employee handbook contains a section on solicitation and distribution which provides:

> Solicitation and the distribution of literature or petitions by any employee or any other individual with the exception of GRS approved service providers is expressly prohibited. Under no circumstances may any employee, whether on or off duty, disturb the work of others to solicit or distribute literature to employees during their work time. Further, persons not employed by or acting on behalf of GRS or Greenbrier may not solicit GRS employees for any purpose on Company premises.

The General Counsel asserts that the first sentence of this policy is overly-broad.

The Supreme Court has agreed with the Board that as long as the employees are not on the clock, solicitations for the union may occur anywhere, including in work areas. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 802–803 (1945); *Our Way, Inc.,* 268 NLRB 394 (1983). Because the rule would reasonably be construed as prohibiting all solicitations except those by GRS service providers, I find it is overly-broad in violation of Section 8(a)(1).

4. Confidentiality provision

The employee handbook has a confidentiality provision on page 38 which states:

> Confidential information. Greenbrier's confidential and proprietary information includes (among other items) business, financial and marketing plans, personnel information, inventions, research, and confidential information entrusted to the Company by vendors, customers and others. Confidential information must be used only by authorized persons and only in accordance with Greenbrier policies and procedures.

Because personnel information is included in this policy, and it is not clear that employees may discuss personnel information with each other anywhere in the handbook, I find the rule is overly-broad. See *U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 3 (2013).

CONCLUSIONS OF LAW

1. By maintaining overly-broad employee handbook provisions regarding confidential information, solicitation, appearance and attire and external communications; interrogating employees about union activities; promising to erase attendance points and erasing attendance points; implementing a safety incentive program; soliciting employee complaints and grievances; promising increased benefits and improved terms and conditions of employment for refraining from supporting the Union; threatening plant closure for supporting the Union; threatening employees and denigrating the Union by telling them the Company is spending money to defend against the this case at a time when other plants are shutting down; threatening employees by making statements that electing the Union would be futile; threatening employees with harm if they choose the Union; laying off/firing employees because of their union membership, activities, and sympathies; refusing to recall or rehire employees because of their union membership, activities, and sympathies; and unilaterally, without notice and an opportunity to bargain with the Union, making and implementing changes to terms and conditions of employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the conduct described above, the Respondent has violated Section 8(a)(5), (4), (3), and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall issue and order recommending it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully promulgated and maintained overly-broad employee handbook provisions regarding confidential information, solicitation, appearance and attire, and external communications, that employees would reasonably construe as infringing on their rights guaranteed under Section 7 of the Act, the Respondent will be ordered to cease and desist from these actions.

Having interrogated employees about Union activities and threatened employees with adverse consequences, including loss of work and plant closure, for engaging in Union activities, the Respondent will be ordered to cease and desist from these actions.

The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc*., 359 NLRB No. 44 (2012).

The most difficult aspect of this case to remedy is the failure to bargain over the decision to relocate work away from the Tucson facility and the effects of that decision. It is well established that in fashioning an appropriate remedy, the Board "must be guided by the principle that the wrongdoer, rather than the victims . . . should bear the consequences of his unlawful conduct," and that the remedy should be adapted to the situation that calls for redress. *Transmarine Navigation Corp*., 170 NLRB 389 (1968); *Ozark Trailers*, 161 NLRB 561 (1966).

Restoration to the status quo ante is presumptively appropriate to remedy unlawful unilateral changes. *Southwest Forest Industries*, 278 NLRB 228–228 (1986), enfd. 841 F.2d 270 (9th Cir. 1988). When bargaining unit work has unilaterally and unlawfully been removed, restoration of the work to the bargaining unit is the appropriate remedy, unless the employer demonstrates that restoration would be unduly burdensome. *Fibreboard Corp.* v. NLRB, 379 U.S. 203, 216 (1964). Here, although the Respondent has "encumbered itself with moving costs" and has begun to ship equipment to other facilities, "it has not shown that the transfer of work was accompanied by major shifts in capital investment." *Pertec Computer*, 284 NLRB 810, 811 (1987). Instead, it moved existing work to existing facilities. The Tucson plant has not been sold, and the General Counsel submitted evidence of specific non-TTX work that could still be performed there. The Respondent likewise has not shown that bargaining over the decision or its effects would have jeopardized its business in any way. By all accounts, the Tucson shop was making money at the time of the decision to close it. In 2013, the Greenbrier Companies, Inc. had revenues of $1.7 billion. I agree with the District Court's analysis and conclusion that restoring operations at the Tucson shop and requiring GRS to bargain with the Union in good faith periodically to reach an agreement or a bona fide impasse is not an undue burden, especially considering the Respondent has already begun to take these steps.[87] Any lesser remedy fails to redress the significant harm inflicted on employees because it renders the majority support they had for the Union prior to the employer's unlawful actions meaningless and sends the message to employees that the Respondent can close shops and disperse employees without regard to any bargaining obligation.

The General Counsel has requested a limited backpay remedy under *Transmarine Navigation Corp*., 170 NLRB 389 (1968). Where a restoration and reinstatement order are issued, such a remedy is normally not appropriate. See *Plaza Properties of Michigan, Inc*., 340 NLRB 983, fn. 12 (2003). Instead, the restoration and reinstatement of employees shall take place in the manner set forth above for the discriminatory discharges.

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id., at 13. See, e.g*., Teamsters Local 25*, 358 NLRB 54 (2012).

The General Counsel has also requested a broad remedial order. Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

The General Counsel has requested that the read aloud by a responsible management official of the Respondent or by a Board agent in the presence of a responsible management official of the Respondent. The Board has required this remedy where an employer's misconduct has been "sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion." *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB 383, 383 (2012). In light of the severity and pervasiveness of the violations detailed herein, I find the General Counsel has established that this remedy is required to enable employees to exercise their Section 7 rights free from coercion. See *AC Specialists. Inc.*, 359 NLRB No. 159, slip op. at 4 (2013).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[88]

ORDER

The Respondent, Gunderson Rail Services, LLC d/b/a Greenbrier Rail Services, its officers, agents, successors, and assigns, shall

1. Cease and desist from maintaining overly-broad employee handbook provisions regarding confidential information, solicitation, appearance and attire, and external communications; interrogating employees about Union activities; promising to erase attendance points and erasing attendance points; implementing a safety incentive program; soliciting employee complaints and grievances; promising increased benefits and improved terms and conditions of employment for refraining from supporting the Union; threatening plant closure for supporting the Union; threatening employees and denigrating the Union by telling them the company is spending money to defend against this case at a time when other plants are shutting down; threatening employees by making statements that electing the Union would be futile; threatening employees with harm if they choose the Union; laying off/firing employees because of their union membership, activities, and sympathies; refusing to recall or rehire employees because of their Union membership, activities, and sympathies; and unilaterally, without notice and an opportunity to bargain with the Union, making and implementing changes to terms and conditions of employment.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overly-broad employee handbook provisions regarding confidential information, solicitation, appearance and attire, and external communications and notify employees in writing that this has been done.

(b) Within 14 days from the date of the Board's Order, offer:

Alex Amador	Jose Angel Ortega
Jesus Fernando Barnes	Carlos Contreras Ortiz

[87] I understand that the District Court ordered the Respondent to undertake these steps based on a likelihood of prevailaing on discrimination allegations in addition to failure-to-bargain allegations. Nonetheless, I find these same actions appropriate based on my findings of Section 8(a)(5) and (1) violations.

[88] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

David Bottinueu	Gabriel Ortiz
Oswaldo Chavira	Brian Perona
Karim Duqmaq	Juan Silva Gutierrez
Hector Federico	Guillermo Gonzalez Pico
Jaime Hernandez	Jesus Omar Ramos
Jesus Armando Lopez-Nuno	Jeff Raske
Jesus Martinez	Jesus Ruiz
Jorge Martinez	Oscar Salinas
Ricardo Martinez	Brian Scaggs
Karl Mason	Jose Manuel Sepulveda
Juan Morales	Rogelio Martinez
Chad Morshback	Frank Soto
Guillermo Murguia	Martin Valdez

full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make these whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment.

(e) Within 14 days from the date of the Board's order, restore operations at the Tucson facility to the status quo ante, including offering full reinstatement to employees who were transferred, discharged, or quit due to our closure of the Tucson, Arizona facility, to their former jobs at the Tucson, Arizona facility, or if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral actions of closing the Tucson shop and failing to bargain over its effects in the manner set forth in the remedy section of the decision.

(f) In the event there are insufficient openings to accommodate all the former Tucson unit employees who wish to return to work at the Tucson facility, including those employees who accepted transfers to the Respondent's other facilities, the Respondent is to bargain in good faith with the Sheet Metal Workers' International Association, Local 359, AFL—CIO about the creation of a preferential recall list and return employees to work at the Tucson facility pursuant to that recall list. Those employees who accepted employment at the Respondent's other facilities are free to remain there, and are under no obligation to accept Respondent's offers to return to work in Tucson.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Tucson, Arizona, and in any facility to which former Tucson employees accepted transfers, copies of the attached notice marked "Appendix."[89] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2012.

(i) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be publicly read by a responsible management official of the Respondent or by a Board agent in the presence of a responsible management official of the Respondent,

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

As to Case 28–RC–093179, because a bargaining order is warranted, the election should be set aside and the petition dismissed. *Riviera Manor Nursing Home, Inc.*, 220 NLRB 124, 425 (1975).

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 30, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

FEDERAL LAW GIVES YOU THE RIGHT TO

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[89] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose a representative to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT maintain the following Confidential Information rule in our employee handbook:

> **Confidential Information**
> Confidential information. Greenbrier's confidential and proprietary information includes (among other items) . . . personnel information . . . Confidential information must be used only by authorized persons and only in accordance with Greenbrier policies and procedures.

WE WILL NOT maintain the following Solicitation Policy in our employee handbook:

> **Solicitation Policy**
> Solicitation and the distribution of literature or petitions by any employee or any other individuals with the exception of GRS approved service providers is expressly prohibited.

WE WILL NOT maintain the following External Communications policy in our employee handbook:

> **External Communications**
> GRS has appointed specific representatives to serve as information channels for news media. These representatives are responsible for approval of all press releases, responding to media inquiries, and coordinating interviews with the media—with the exception of marketing or employment related advertising—other employees should refrain from communications with the media.
>
> Please be aware that in cases of accident or emergency involving a specific employee, nonmanagement employees are prohibited from contacting the employee's family, friends of anyone involved in the emergency or accident, or the media, as such contact can cause significant confusion and undue distress. Proper communication channels have been established for designated trained employees to contact family members in case of an accident or emergency.

WE WILL NOT maintain the following Appearance and Attendance policy in our employee handbook:

> **Appearance and Attire**
> "Regardless of the work environment, provocative slogans or images on clothing, hats, etc., and revealing or impractical attire, is not appropriate."

WE WILL NOT ask questions about your union support or activities.

WE WILL NOT promise to erase your attendance points, or erase your attendance points, to dissuade you from supporting the Sheet Metal Workers' International Association, Local 359, AFL–CIO, or any other union.

WE WILL NOT implement a safety incentive program to dissuade you from supporting the Sheet Metal Workers' International Association, Local 359, AFL–CIO, or any other union.

WE WILL NOT solicit complaints and grievances from you, thereby promising you increased benefits and working conditions if you refrain from union activities.

WE WILL NOT promise you increased benefits and improved terms and conditions of employment if you refrain from engaging in any activities on behalf of the Sheet Metal Workers' International Association, Local 359, AFL–CIO, or any other union.

WE WILL NOT threaten you with plant closure if you support the Sheet Metal Workers' International Association, Local 359, AFL–CIO, or any other union.

WE WILL NOT threaten you with plant closure because you decide having the Sheet Metal Workers' International Association, Local 359, AFL–CIO, or any other union, as your bargaining representative.

WE WILL NOT threaten you by telling you the Company is spending money to defend against this case at a time when other plants are shutting down.

WE WILL NOT denigrate the Sheet Metal Workers' International Association, Local 359, AFL–CIO, or any other union, in order to dissuade your support for the Union.

WE WILL NOT threaten you by making statements that electing the Sheet Metal Workers' International Association, Local 359, AFL–CIO, or any other union, would be futile.

WE WILL NOT threaten you by telling you that you will be harmed if you chose the Sheet Metal Workers' International Association, Local 359, AFL–CIO or any other union as your bargaining representative.

WE WILL NOT tell you that engaging in union or protected activities could result in job loss.

WE WILL NOT lay you off or fire you because of your union membership, activities, and sympathies.

WE WILL NOT refuse to recall or rehire you because of your union membership, activities, and sympathies.

WE WILL NOT unilaterally, without notice and an opportunity to bargain with the Sheet Metal Workers' International Association, Local 359, AFL–CIO or any other union, make and implement changes to your terms and conditions of employment.

WE WILL NOT fail and refuse to recognize and bargain with the Sheet Metal Workers' International Association, Local 359, AFL–CIO as the exclusive collective-bargaining representative of our employees in the unit.

WE WILL NOT refuse to meet and discuss in good faith with the Sheet Metal Workers' International Association, Local 359, AFL–CIO any proposed changes in wages, hours and working conditions before putting such changes into effect, including firing unit employees, recalling or rehiring unit employees, changing the timing of a raise for some unit employees, refusing to rehire or recall some unit employees, and implementing and ending a safety incentive program, or closing the Tucson facility.

WE WILL NOT implement unilateral changes that affect your wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL, on request of the Union, bargain with the Union as the exclusive representative of unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

The unit is:

> All full-time and regular part-time AAR write-up employees, airmen, laborers, material handlers, maintenance mechanics, painters, switchmen, and welder repairmen located at our Tucson, Arizona facility, excluding all other employees, including quality assurance inspectors, office clericals, guards, safety coordinators, plant managers, production managers, foremen, quality assurance managers, material managers, plant accounting managers, and supervisors as defined in the Act.

WE WILL, upon request of the Union, rescind our decision to close the Tucson facility.

WE WILL restore and reopen the Tucson facility with your employment that existed prior to September 5, 2012.

WE WILL notify and give the Union an opportunity to bargain before making any changes to your terms and conditions of employment, including: closing the Tucson facility, recalling you, rehiring you, firing you, changing the terms of a wage increase, implementing and rescinding a safety incentive program, and the requiring that you fill out a new job application for rehiring you.

WE WILL if requested by the Union, rescind any or all changes to your terms and conditions of employment that we made without bargaining with the Union**.**

WE WILL rescind the confidential information, solicitation, external communications, and appearance and attire policies in our employee handbook.

WE WILL furnish all current employees with inserts for the current employee handbooks that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (3) provide the language of lawful rules and notify all employees who were issued the our employee handbook containing the unlawful confidential information, solicitation, external communications, and appearance and attire that these rules have been rescinded and will no longer be enforced.

WE WILL immediately offer, to the extent that we have not already done so, to reinstate the following individuals to their former positions in Tucson, and if those jobs no longer exists, to a substantially equivalent position, without any loss to their seniority rights or any other privileges, and WE WILL immediately make them whole with interest, compounded on a daily basis, for the wages and benefits they lost because we laid them off or discharged them, and WE WILL compensate them for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year:

Alex Amador
Jesus Fernando Barnes
David Bottinueu
Oswaldo Chavira
Karim Duqmaq
Hector Federico
Jaime Hernandez
Jesus Armando Lopez-Nuno
Jesus Martinez
Jorge Martinez
Ricardo Martinez
Karl Mason
Juan Morales
Chad Morshback
Guillermo Murguia
Jose Angel Ortega
Carlos Contreras Ortiz
Gabriel Ortiz
Brian Perona
Juan Silva Gutierrez
Guillermo Gonzalez Pico
Jesus Omar Ramos
Jeff Raske
Jesus Ruiz
Oscar Salinas
Brian Scaggs
Jose Manuel Sepulveda
Rogelio Martinez
Frank Soto
Martin Valdez

WE WILL within 14 days, remove from our files, any and all records of the layoff and discharge of the individuals named below and WE WILL within 3 days thereafter, notify them in writing that we have taken this action, and that the materials removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them:

Alex Amador
Jesus Fernando Barnes
David Bottinueu
Oswaldo Chavira
Karim Duqmaq
Hector Federico
Jaime Hernandez
Jesus Armando Lopez-Nuno
Jesus Martinez
Jorge Martinez
Ricardo Martinez
Karl Mason
Juan Morales
Chad Morshback
Guillermo Murguia
Jose Angel Ortega
Carlos Contreras Ortiz
Gabriel Ortiz
Brian Perona
Juan Silva Gutierrez
Guillermo Gonzalez Pico
Jesus Omar Ramos
Jeff Raske
Jesus Ruiz
Oscar Salinas
Brian Scaggs
Jose Manuel Sepulveda
Rogelio Martinez
Frank Soto
Martin Valdez

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL within 14 days, offer full reinstatement to our employees who were transferred, discharged, or quit due to our closure of the Tucson, Arizona facility, to their former jobs at the Tucson, Arizona facility, or if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL immediately make employees who were transferred, discharged, or quit due to our closure of the Tucson, Arizona whole, with interest, compounded on a daily basis, for the wages and benefits they lost because we transferred them or they quit, and WE WILL compensate them for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

GUNDERSON RAIL SERVICES, LLC D/B/A GREENBRIER RAIL SERVICES

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-093183 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.